

63231-1

63231-1

No. 63231-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CARL CHANEY,

Appellant.

Filed
Oct. 30, 09
4

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

The Honorable Deborah Fleck

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court's decision to admit evidence obtained from polygraph reports at Carl Chaney's sentence modification hearing violated his rights to due process under the Fourteenth Amendment of the United States Constitution and Article I, § 3 of the Washington Constitution.

2. The court's decision to admit hearsay evidence deprived Mr. Chaney of due process.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The due process clause of the Fourteenth Amendment serves to provide certain protections in sentence modification hearings, including requiring disclosure to the defendant of the evidence against him. From the beginning of the proceeding, Mr. Chaney repeatedly requested copies of polygraph reports which the State intended to use against him. The State finally furnished the reports in the middle of its cross-examination of Mr. Chaney, after it had finished its case in chief. Did this refusal to disclose at a reasonable time violate Mr. Chaney's due process rights?

(Assignment of Error 1)

2. In a sentence modification hearing, due process also guarantees the defendant the right to confront and cross-examine

the witnesses against him, unless the court finds good cause to forgo live testimony. Here, the State relied on hearsay evidence – the two polygraphers' determinations of Mr. Chaney's honesty and alleged statements to them – although neither polygrapher testified. Did the admission of this evidence violate Mr. Chaney's due process rights? (Assignment of Error 2)

3. To admit hearsay evidence, the court must find good cause. Here, the court made no finding as to good cause and nothing on the record would support such a finding. Did the court's denial of confrontation without good cause violate Mr. Chaney's due process rights? (Assignment of Error 3)

C. STATEMENT OF THE CASE

Mr. Chaney was charged with violating conditions of his community placement by having contact with a minor, failing to pay court-ordered legal financial obligations (LFO's), and failing to comply with sex offender registration requirements. CP 68-74.

At the sentence modification hearing, Mr. Chaney, representing himself, requested a continuance to examine evidence, including polygraph reports, and subpoena witnesses, including the polygrapher. 3/5/09RP 5. The court denied Mr.

Chaney's motion. 3/5/09RP 7. Throughout the hearing Mr. Chaney continued to object to any reference to the polygraphs.

Mr. Chaney testified, just as he had previously admitted to his parole officer, Jeffrey Brown, and the polygraph examiner, that he had contacted his 17 year old daughter E.C. under urgent and extenuating circumstances, in an attempt to assist the Auburn Police Department in locating his adult son, who was temporarily missing. 3/11/09RP 17-18.

Mr. Chaney did not dispute his failure to pay LFO's. However, he testified he had not had the means to make payments since his last release on January 2, 2009, despite extensive efforts to find work. 3/11/09RP 18-21.

Mr. Chaney testified he was homeless and registering weekly, as required, until January, 2009, when he moved to a motel in Federal Way with his ex-wife. 3/11/09RP 20-21. Parole Officer Brown had approved this motel, and Mr. Chaney testified Officer Brown told him he would still be considered homeless while living in a motel, so he did not realize he would need to register a change of address. 3/11/09RP 22.

At the conclusion of the hearing, the court found Mr. Chaney committed all of the violations alleged. CP 78-79. Although the

Court believed Mr. Chaney's testimony that he had contacted E.C. only to find his son, and that he had been looking for work, the court found the violations willful. 3/11/09RP 47-50.

The court continued supervision and imposed 50 days total confinement. CP 78-79 The sentence was modified to require Mr. Chaney to complete his sexual deviancy evaluation, upon notification by Officer Brown that DOC had arranged to pay for it, and to complete a sexual history polygraph to be scheduled and paid for by DOC through Officer Brown. CP 79.

D. ARGUMENT

1. THIS COURT SHOULD REVIEW THIS APPEAL BECAUSE IT INVOLVES MATTERS OF CONTINUING AND SUBSTANTIAL PUBLIC INTEREST.

Because Mr. Chaney has completed the sentence imposed pursuant to these violations, the State may argue that this case should be dismissed as moot. "A case is moot if a court can no longer provide effective relief." *State v. Mines*, 146 Wn.2d 279, 284-85, 45 P.3d 535 (2002) (quoting *In re Cross*, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983)).

Even if the case is technically moot, this Court can and should review it because it involves "matters of continuing and substantial public interest." *Sorenson v. City of Bellingham*, 80

Wn.2d 547, 558, 496 P.2d 512 (1972). In order to decide whether to review a technically moot case, this Court should consider “the public or private nature of the questions presented, the desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrence of the question.” *Id.*

In a case similar to Mr. Chaney’s, this Court decided to review the appeal of a sentence modification, even though it was technically moot because the appellant had been released from custody. *State v. Abd-Rahmaan*, 120 Wn. App. 284, 288-89, 84 P.3d 944 (2004) (“*Abd-Rahmaan I*”) (affirmed on this point but overturned on other grounds by *State v. Abd-Rahmaan*, 154 Wn.2d 280, 111 P.3d 1157 (2005) (*Abd-Rahmaan II*)). This Court held “issues involving sentence modification procedures are of a public nature.” *Abd-Rahmaan I*, 120 Wn. App. at 288-89. The Court observed that no published case at that time applied *Morrissey v. Brewer*¹ to the sentence modification context, so guidance on this issue was desirable. *Id.* at 289. Finally, the Court recognized that because the maximum sanction for each sentence violation is 60

¹ 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)

days of confinement,² “it is likely that any potential appellant will be released before the appeal is completed.” *Id.*

The same factors are present here. Sentence modification procedures and due process violations are of a public nature. No published case since *Abd-Rahmaan* has addressed due process in sentence modification, so further guidance is needed in this area. No published case addresses the State’s duty, under *Morrissey*, to disclose to the defendant the evidence against him, in revocation or modification hearings; this due process guarantee has not been clarified in Washington since *Morrissey* was decided in 1972. And the particular hearsay issue raised here is guaranteed to arise again, since regular polygraph examinations are a common community placement condition, particularly for sex offenders. The State frequently seeks to use information or statements obtained from polygraph reports in revocation or modification hearings; in such cases, the trial courts need guidance regarding the defendant’s right to confront the polygrapher.

Mr. Chaney therefore respectfully requests that this Court find an exception to the mootness doctrine and review his appeal.

² RCW 9.94A.634(c).

2. BECAUSE THE COURT DENIED MR. CHANEY HIS RIGHT TO REVIEW THE EVIDENCE AGAINST HIM AND TO CONFRONT ADVERSE WITNESSES, THE SENTENCE MODIFICATION ORDER DEPRIVED HIM OF HIS DUE PROCESS RIGHTS, RENDERING IT INVALID.

Due process requires, at a minimum, that at parole revocation hearings:

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 factfinders as to the evidence relied on and reasons for revoking parole.

Morrissey, 408 U.S. at 489 (emphasis added). These minimum requirements "assure that the finding of a parole violation will be based on verified facts and the exercise of discretion will be based on verified facts and the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior. *Id.* at 484. See also *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) (applying *Morrissey* to probation revocation hearings); *Abd-Rahmaan II*, 154 Wn.2d 280 (applying *Morrissey* to sentence modification hearings).

Mr. Chaney's rights under the due process clause of the Fourteenth Amendment were violated by a sentence modification order which relied on evidence the State had refused to disclose to him, and hearsay testimony with no finding or indication of good cause for the declarants' absence.

a. Mr. Chaney repeatedly and consistently asserted his due process rights to discovery and confrontation. An appellant who argues he was deprived of his due process rights under *Morrissey* must have objected at the hearing. *State v. Nelson*, 103 Wn.2d 760, 765, 697 P.2d 579 (1985); *State v. Robinson*, 120 Wn. App. 294, 299-300, 85 P.3d 376 (2004). Here, there can be no question that Mr. Chaney preserved his objections at every opportunity.

On the first day of proceedings, Mr. Chaney moved for a continuance. He explained that, because there was no longer access to the law library at the Regional Justice Center, he had been unable to subpoena necessary witnesses and evidence. He hoped that, with a continuance, his standby counsel could do it for him. He specifically asserted the rights at issue here:

...I have a right to confront the witnesses. The polygraph examiners, I wish to question them about how the polygraph went. I wish to see the polygraph – the actual polygraph reports that were submitted so that I can challenge those issues, because Officer

Brown has misstated some of this stuff that the polygraph examiner and I had discussed.

3/5/09RP 5.

In response, the State claimed it would not need to use the polygraphs to make its case, stating, "the violations alleged today can be proven without the polygraph.... I don't think the polygrapher needs to be here." 3/5/09RP 6. The court denied Mr. Chaney's motion. 3/5/09RP 7.

During the State's direct examination of Officer Brown, Mr. Chaney repeatedly objected to questioning about the polygraph, stating, "Until I am assured that I'm going to receive the polygraph data and an opportunity to confront the polygraph examiners, any reference to the polygraph should be inadmissible as hearsay." 3/5/09RP 20, 24-25. The court overruled the objection.

At the conclusion of the State's evidence, Mr. Chaney again told the court that he wanted to review the polygraph reports and confront the polygraphers. 3/5/09RP 28. The prosecutor replied, "Your Honor we have the polygraph reports. I'm not sure what Mr. Chaney needs to see." *Id.* However, the prosecutor apparently did not give the reports to Mr. Chaney. The Court set the matter over to March 11, 2009.

When the hearing resumed, Mr. Chaney still had not been able to review the reports or question the polygraphers. However, the court continued to overrule Mr. Chaney's repeated objections to inadmissible evidence arising from the polygraphs. 3/11/09RP 24, 25, 26, 27, 28, 31. The State argued Mr. Chaney's polygraph answers were highly relevant to his credibility and offered the polygraph reports into evidence. 3/11/09RP 28-29. Although the court ruled, "I'm not hearing what the polygraph results themselves were, but rather what you stated," it continued to admit hearsay from the content of the polygraph reports. 3/11/09RP 30.

In the middle of its cross-examination of Mr. Chaney, the State finally, and abruptly, agreed to provide him with the reports. 3/11/09RP 25. Mr. Chaney was not provided with a continuance or even a recess to review them.

In closing argument, the State relied in part on evidence from the polygraphs, arguing that it showed Mr. Chaney is not credible. 3/11/09RP 39. Mr. Chaney began his closing argument by renewing his objection to polygraph evidence. 3/11/09RP 41.

Upon announcing its ruling, the court stated it would not consider the polygraph reports themselves:

I have not received in evidence the polygraphs. I am not considering the polygraphs at this point in time, other than the questions and answers that [the prosecutor] asked, and you gave on the record.

3/11/09RP 47. However, Officer Brown's testimony about Mr. Chaney's "deceptions" and hearsay evidence about Mr. Chaney's alleged statements to the polygraphers were all drawn directly from the reports. The court heard and considered at least some of the evidence contained in the reports whether or not it read the reports themselves.

The due process violations are as serious as if the reports had been entered into evidence. Despite its protestation that it would not need the polygraph to prove its case, the State relied extensively on the information contained in those reports. And although the court did not consider the polygraph reports themselves, it did consider that evidence, rendering the sentence modification invalid.

b. The State presented and the court relied on extensive hearsay evidence, without affording him the opportunity to confront the declarant, and without good cause to forgo live testimony. *Morrissey* guarantees "the right to confront and cross-examine adverse witnesses (*unless* the hearing officer specifically finds

good cause for not allowing confrontation).” *Morrissey*, 408 U.S. at 489. (emphasis added). Here, with no good cause finding, and despite repeated objections, Mr. Chaney was not permitted to confront polygraphers whose statements were used against him.

Over Mr. Chaney’s objection, Officer Brown testified, “I met with Mr. Chaney to discuss the violations that were brought about through the polygraph, and to discuss his deception.” 3/5/09RP 20.

During cross-examination of Mr. Chaney, and over his repeated objections, the following hearsay was admitted:

Q: You told the polygrapher, Mr. McNeal, that you had actually talked to [E.C.] three to four times that day, correct.

A: I don’t remember. I think I only had contact with her twice.

Q: Okay. Are you disputing that you told the polygrapher three to four times?

...

A: I know that we discussed it, and I do not remember how many times I told him. I can remember twice.

....

Q: And you were confronted by the polygrapher because he said you showed deception [in response to a question about contact with E.C.], correct?

A: That is what he said, yes.

Q: Okay. And then [sic] ended up acknowledging that, yes, in fact you had had some physical contact with Emily, correct?

A: Correct.

Q: And on that same day you were asked about whether you had initiated contact with any minors that you had not told him about, correct?

...

Q: [W]ere you asked the question whether you had initiated a contact with minors that you had not told the polygrapher about, correct?

A: Correct.

Q: And you answered no, correct?

A: Correct.

Q: But in fact, he confronted you and said you were showing deception on that, correct?

A: That is what he said.

Q: And then you came up with a bunch of instances where you may have seen minors, correct?

A: Well, it's impossible not to see any, where you ride the city bus. And we discussed all those things.

...

Q: Mr. Chaney, on the second polygraph that took place you were asked whether you had engaged in any grooming behaviors with anyone seventeen or younger, and you answered no, correct?

A: Correct.

Q: When you were confronted with that answer and the result of the polygraph, you ended up revealing information about contact with someone younger than seventeen, Jolene, correct?

A: Incorrect. I have not had contact with anybody under seventeen. Jolene is over eighteen.

Q: I didn't say under seventeen, Mr. Chaney. [sic] You told the polygrapher your ex-wife was concerned about someone named Jolene who had just turned eighteen; is that correct?

A: No.

3/11/09RP 24-31

When the court announced its ruling, it again clarified, that it would not consider the polygraph reports or results themselves.

3/11/09RP 47. But even with testimony alone, a substantial amount of inadmissible, unfronted hearsay was before the court.

The characterization of Mr. Chaney's statements to the first polygrapher, Mr. McNeil, as "deception" was brought out in direct examination of Officer Brown and cross-examination of Mr. Chaney. 3/5/09RP 20; 3/11/09RP 24, 28. This was the opinion of the polygrapher, not the witnesses. Even though the court did not consider the polygraph *reports*, it heard and considered the results through this testimony. They were offered for the truth of the matter asserted: that Mr. Chaney was deceptive. In fact, the State argued this evidence should be admitted because it showed Mr. Chaney was deceptive, and therefore was relevant to his credibility. Without the testimony of Mr. McNeil himself, these statements were plainly hearsay.

In addition, although Mr. Chaney's own statements to the polygraphers were not hearsay, the polygraphers' statements *about* Mr. Chaney's statements were hearsay. These included Mr.

Chaney's purported admissions that he spoke to E.C. three to four times while his son was missing, that he had initiated contact with other minors, that he believed his wife was concerned about his contact with a young woman, and that he had been thinking about that woman. All of these statements are prejudicial, particularly given that they were offered explicitly for the purpose of undermining Mr. Chaney's credibility. According to its own argument, the State offered this evidence for the truth of the matters asserted, thereby attempting to demonstrate that Mr. Chaney lied and was not credible. In addition, the statement about his contact with E.C. goes directly to one of the alleged violations. Thus, these statements were also hearsay which was inadmissible without a finding of good cause.

c. The court failed to find good cause to admit hearsay evidence. Admission of hearsay evidence at a sentence modification hearing requires a finding of good cause. *State v. Dahl*, 139 Wn.2d 678, 990 P.2d 396 (1999); *Abd-Rahmaan II*, 154 Wn.2d 280. "Good cause" is evaluated "in terms of the difficulty and expense of procuring witnesses in combination with 'demonstrably reliable' or 'clearly reliable' evidence." *Nelson*, 103 Wn.2d at 765.

In *Dahl*, the appellant was alleged to have exposed himself to four teenage girls; at his SSOSA revocation hearing, the State presented hearsay testimony of the girls' identification of him in a photo montage. Dahl did not have the opportunity to confront or cross-examine the girls themselves. The Supreme Court found that nothing on the record addressed the reliability of the identification. "Without knowing any circumstances surrounding the incident and the girls' statements, the court had no information upon which to base a determination of reliability." *Id.* at 687. Nor did the record show difficulty or expense associated with calling the necessary witnesses. *Id.* at 687. The Court therefore found the admission of the hearsay was not supported by good cause, and Dahl's due process right to confrontation was violated. *Id.*

In *Abd-Rahmaan II*, the Supreme Court considered a sentence modification hearing where the defendant was found to have violated the conditions of his sentence, based on the hearsay testimony of his CCO, repeating the accusations of a non-testifying declarant. 154 Wn.2d at 283.

The Court of Appeals had found the hearsay reliable because other, admissible testimony regarding the defendant's employment status corroborated some of the hearsay, and because

the defendant participated in and testified at his hearing, and could have called other witnesses to rebut the testimony. *Id.* at 284. In addition, the Court of Appeals had “inferred” that there was difficulty and expense in calling the witnesses, justifying admission of the hearsay. The Supreme Court flatly rejected the Court of Appeals’ reasoning on both points, pointing out that the record simply did not support either conclusion. *Id.* at 290. Although written findings as to good cause would be preferable, the Court held, they were not required. *Id.*

[H]owever, appellate courts require some record explaining the evidence on which the trial court relied and the reasons for the admission of the hearsay evidence. These requirements are necessary in order for an appellate court to ascertain whether there is substantial evidence to support the trial court’s decision to modify a sentence.

Id. Because “the trial court here made no record to support a conclusion that there was good cause to admit the hearsay evidence,” the record was insufficient. *Id.* The sentence modification was therefore invalid. *Id.*

The same scenario is presented here. The State made only one attempt to explain the polygraphers’ absence. In the middle of an argument for the admissibility of the polygraph reports, the prosecutor stated, “the polygraphers cannot come in person, they

are doing polygraphs all day today.” 3/11/09RP 29. The State offered no elaboration or proof in support of this assertion and the court did not ask for any.

An unsupported assertion that the polygraphers were busy does not constitute good cause. There was no indication that it would have been difficult or expensive to procure their presence, or that the State had made any effort to do so. It seems unlikely that the prosecutor had tried to schedule their testimony, given that on the first day of proceedings, she argued against Mr. Chaney’s motion to continue, on the grounds that the polygraphs would not be part of the State’s case. But Mr. Chaney had left no doubt as to his desire to cross-examine the polygraphers, and the State had no excuse for not providing him the opportunity to do so.

As discussed above, the evidence was not demonstrably reliable. It consisted of the polygraphers’ determinations of Mr. Chaney’s “deception” and reports of statements he allegedly made to them. Only confrontation could provide the reliability due process requires.

As in *Abd-Rahmaan II*, the court made no finding and no record as to good cause. Because the record is insufficient for this Court to review, the sentence modification is invalid.

d. The State's refusal to disclose evidence to Mr. Chaney at a reasonable time deprived him of due process. *Morrissey* requires "disclosure to the parolee of the evidence against him." 408 U.S. at 489.

As noted above, Mr. Chaney repeatedly invoked his right to review the evidence against him, to no avail. During his cross-examination, Mr. Chaney objected yet again to questions about the polygraphs and pointed out he had not seen the report. 3/11/09RP 25. The prosecutor replied, "You are welcome to have the report, Mr. Chaney. I'm going to continue to ask you about it." *Id.* Mr. Chaney objected, pointing out, "it's a little late to give it to me now to read through at this point." *Id.* The prosecutor – missing entirely the point of this due process requirement – interjected, "You don't need a report to answer the question." *Id.* The court told Mr. Chaney he could review the reports but did not grant a recess or otherwise provide time for him to examine them. *Id.* Instead, cross-examination simply proceeded.

Although no published case addresses the specifics of *Morrissey's* disclosure requirement, common sense dictates that disclosure at such a late time is essentially worthless. It serves none of the purposes of fairness and accuracy that *Morrissey*

intended to guarantee. In order to be meaningful, disclosure must occur before the State puts on its case, with at least enough time for the probationer to review it. The State's stubborn refusal to provide Mr. Chaney with the reports until it was too late is unjustifiable.

e. The errors were prejudicial. In *Dahl*, the Court was not sure how much weight the trial judge had placed on the inadmissible hearsay, but because the revocation "appear[ed] to have been based, at least in part" on that evidence, the error was not harmless. 134 Wn.2d at 688. The *Abd-Rahmaan II* Court, on the other hand, reversed without engaging in a harmless error analysis. 154 Wn.2d at 291.

Here, the violation was particularly egregious in light of Mr. Chaney's repeated, adamant objections. Although pro se and incarcerated, he could not have been more diligent in his attempts to exercise the minimal due process protections guaranteed to him. However, when the court refused to fulfill those guarantees, Mr. Chaney was helpless.

Mr. Chaney had the right to review the evidence against him, including the polygraph reports. He was entitled to receive those reports at a reasonable time, such as when he requested them at

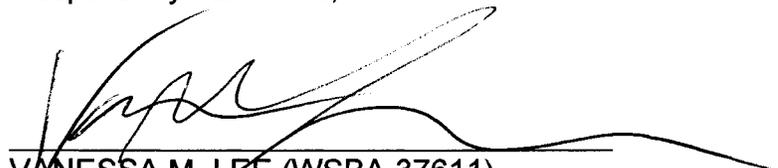
the beginning of the hearing – not in the middle of his cross-examination, after the State had already finished its case. Mr. Chaney also had the right to confront the polygraphers whose reports were used against him – to challenge their credibility, to impeach them with a false polygraph result he referenced several times in his argument, to test their recollection of his statements, and to put those statements in context. This is the reliability that confrontation creates. Without such indicia of reliability, the sentence modification is invalid, as in *Abd-Rahmaan II*, and must be reversed.

F. CONCLUSION

For the reasons stated, Mr. Chaney respectfully requests this Court review his sentence modification and find it invalid.

DATED this 30th day of October, 2009.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 63231-1-I
)	
CARL CHANEY,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF OCTOBER, 2009, 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:

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DIVISION ONE
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X _____ 

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