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NO. 63979-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,
v.
JEFFREY HAAS,
Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE HOLLIS R. HILL

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED.

1. Counsel for the Appellant (Jeffrey Haas) acknowledged that Mr. Haas had committed the allegations alleged by the State, but provided an explanation and legal justification for doing so. The Court made clear that she was finding the violations based on the insufficiency of the explanation and the lack of authority for the legal justification. Was there a sufficient basis for the court to find that the defendant violated the conditions of probation?

2. Counsel for Mr. Haas did not object to consideration of the DOC violation reports until after the court had found that the Mr. Haas violated the terms of his probation. Did the defendant fail to preserve his objection by not objecting until after the court had ruled?

B. STATEMENT OF THE CASE.

Jeffrey Haas was found guilty after a plea of guilty to Attempted Failure to Register and sentenced to a suspended sentence of 12 months on condition that he comply with the standards of rules and regulations of supervision. CP 6-21.

On February 2, 2009, the Court found that Mr. Haas changed his address "without notice to or permission of DOC," imposed a 60-day sanction and extended probation until December 1, 2009. CP 33-34.

On July 28, 2009, the court held a hearing to determine if Mr. Haas had committed violations of probation as alleged in the 3/19/09 violation report. The violations alleged were:

- 1) Failing to receive approval from the Department of Corrections prior to changing residences on or about 3-10-2009 in Pierce County, WA.
- 2) Failing to report to the Department of Corrections as directed since on or about 3-16-2009 in Pierce County, WA.
- 3) Failing to report to the Department of Corrections as directed since on or about 3-17-2009 in Pierce County, WA.

CP 40.

At the beginning of the hearing, the prosecutor recited the issues that the court would need to decide, based on the agreement of the attorneys during discussions prior to the hearing:

My understanding - - usually we just kind of proceed with the are the allegations admitted or not. My understanding from the defense is that the defendant is admitting essentially the actions that underlie the basis for the allegations, but doesn't believe that the - - - that probation had the right to require him to do so. If that is

the case, I think we can just have some argument on that.

RP 2-3 (emphasis added).

Counsel for Mr. Haas immediately confirmed that the issue for the first violation was not whether Mr. Haas committed the violation, but merely whether there was legal authority for the requirement:

THE COURT: Counsel, is that correct?

MR. FRANKLIN: And your honor, for the record, Chris Franklin on behalf of Mr. Haas. The issue in regards to allegation number one, Mr. Haas's position is, and I tend to agree, is that DOC is trying to violate him for a condition that don't necessarily have the right to impose anyway.

RP 3.

The court interrupted counsel for Mr. Haas before he addressed the allegations for failing to report. Nonetheless, counsel later admitted that violation:

Yes, he didn't go in when he was reported, but he also know that they were going to arrest him when he wanted to be able to come to court and address this with the court rather than have to be arrested and sit in jail for some time before he got a hearing.

RP 10. Counsel for Mr. Haas again was given an opportunity to deny the allegations, but instead confirmed that he was merely providing an explanation for admitted behavior:

THE COURT: . . . It sounds like he is admitting them with explanation, which I have now heard, is that correct?

MR. FRANKLIN: I mean that - - I think in essence that - - - I mean technically he is acknowledging - -

THE COURT: Um-hum?

MR. FRANKLIN: - - but I do think what he is trying to articulate is that he is trying to do his very best to maintain compliance . . .

RP 15.

Counsel for Mr. Haas likewise confirmed that Mr. Haas had been informed that DOC wanted him to obtain permission to move to a particular address prior to moving to that address:

THE COURT: Okay, what I was saying is that the judgment and sentence requires Mr. Haas to comply with the standard conditions of probation.

I have in front of me the standard conditions of probation, which he refused to sign but nonetheless were provided to him, and one of them is "obtain written permission from the community corrections officer," or "notify the community corrections officer before changing residence or employment."

MR. FRANKLIN: Right.

RP 6-7.

Mr. Haas acknowledged that he did not receive approval for the address that he moved to before moving:

Before I moved this time, I told her I was moving, and I was going to be in Tacoma and I told her I was going to be at one or two addresses. I don't know which one because both houses need to be worked on, and I moved there because I was at my brother's, and he was moving. I was there for a week.

I had to move because he moved out, and this was the only place I could find, and I told her before I moved that I was going to one of these two houses that are a matter of a couple of blocks apart. And so I moved and Monday - - I moved on the weekend; Monday I told her where I was, what the address was, and I went and registered on Monday when I knew which address I was going to.

RP 11-12. Mr. Haas likewise made clear that he believed he could not legally be required to comply with the requirement of prior approval of a specific address:

And as for under the RCWs, like I said, they are outlined in the RCW what the mandatory conditions are, unless they are taken off by the judge, or unless more are added to.

For a misdemeanor, that's what the rule is, and I spoke to my attorney before this. I told him that I didn't want to be with DOC because I know that they will try and do and propose things that don't matter.

RP 13.

The court ruled and made clear that she based her ruling on the admission by Mr. Haas and his counsel that he admitted the allegations, but that she was rejecting both his legal argument that DOC did not have the power to impose the requirement of prior approval and also rejecting his explanation that he did his best to comply:

Mr. Franklin, I am going to interrupt you there, because I am starting to hear repetitive argument.

What I understand is that you believe your client tried to comply and that . . . and alternatively that he doesn't think that the department has the authority to require him to notify them before he moves.

On the legal issue, if what you're making is a motion to the court to find that the department of corrections doesn't have the legal authority to do what it is doing, that motion is denied. The department does have the authority.

If you want to brief it, if your client wants to brief it, that's fine. I have seen no authority to the contrary, absolutely none.

As far as looking at - - this not the first time Mr. Haas has been in front of me for probation violation it is the second time, and as I look at the record in this case, I don't find compliance.

RP 20.

The first time that Mr. Haas indicated that he was either denying the allegations or objecting to consideration of the DOC report was after the court ruled that she had rejected his arguments and was revoking his probation:

THE COURT: . . . You, just again and again, I don't see compliance here, and I am going to revoke his probation.

MR. FRANKLIN: And your honor if I can just note, your honor, I understand the court is using the report to base that information, on; however, that DOC officer is not present and we would object . . .

RP 20. In response, the court made clear that there was sufficient information in the record for the court to find a violation and that the court was making its decision based on the prior violations and the

inadequacy of the explanation, not what was included in the DOC violation report:

Okay, so that one [the prior violations that formed the basis for the first revocation of probation] has already been adjudicated, the first probation violation, and I don't even need the underlying facts to look to the record here and find that Mr. Haas's probation has already been violated once, and this is the second time - - - this is the second time with the same explanation or excuse or whatever you want to call it, that the department doesn't have the authority to supervise him in this way, and I believe that it was made perfectly clear in the judgment and sentence and in the conditions of probation that your client refused to sign, that they do have that authority, so I am going to violate your probation, Mr. Haas, because I am finding that you have intentionally violated the conditions of your probation.

RP 21.

C. ARGUMENT.

- 1. THE COURT BASED ITS FINDING THAT THE MR. HAAS VIOLATED PROBATION ON HIS ADMISSIONS, THE FACT THAT HE USED THE SAME EXCUSE TO JUSTIFY HIS CURRENT VIOLATION THAT HE USED AT HIS PREVIOUS VIOLATION HEARING AND THE LACK OF AUTHORITY PROVIDED BY THE DEFENDANT IN SUPPORT OF HIS LEGAL JUSTIFICATION, NOT ON THE STATEMENTS FOUND IN THE DOC VIOLATION REPORTS.**

Mr. Haas claims that he did not admit that he violated probation and that the only basis for a conclusion that he did violate

probation was the information provided by his Community Corrections Officer (CCO) in the violation report. To the contrary, Mr. Haas's counsel confirmed that he was admitting the violation with an explanation. Mr. Haas affirmatively represented to the court that he did not tell his CCO which address he was moving to until after he had moved. His attorney affirmatively represented that Mr. Haas failed to report because he did not want to go to jail. The court clearly indicated that it rejected the defendant's explanation of why he failed to obtain permission for a new address prior to moving based on his prior violation of the same requirement and the fact that he used the same explanation that was rejected at the prior hearing. There was a sufficient basis in the record to support the court's finding that the defendant violated the conditions of his probation.

An offender serving a conditional suspended sentence has minimal due process rights at a revocation hearing. These rights include (1) the right to confrontation unless good cause to deny it is specifically found and (2) a written finding as to the evidence relied on and reasons for the revocation of probation or parole. "Good cause has thus far been defined in terms of difficulty and expense of procuring witnesses in combination with 'demonstrably reliable' or 'clearly reliable' evidence." The Ninth Circuit has held hearsay evidence from state probation reports is sufficiently reliable under this test.

State v. Badger, 64 Wn. App. 904, 907-08, 827 P.2d 318 (1992)
(citations omitted).

A court may find a sufficient basis in the record to revoke based on the defendant's own admissions regardless of whether inadmissible hearsay is also offered. See Badger, at 908-09 ("[The defendant's] admissions constitute evidence of serious noncompliance which, standing alone, would support revocation even without the evidence which [the defendant] would have us exclude as inadmissible hearsay").

As with the granting of probation, the decision to revoke a deferred sentence and probationary status rests in the sound discretion of the trial court. At the probation revocation hearing, the court need not be furnished with evidence establishing guilt of criminal offenses beyond a reasonable doubt. All that is required is that the evidence and facts be such as to reasonably satisfy the court that the probationer has breached a condition under which he was granted probation, or has violated any law of the state or rules and regulations of the Board of Prison Terms and Paroles.

State v. Kuhn, 81 Wn.2d 648, 649, 503 P.2d 1061 (1972). An abuse of discretion occurs only when the decision of the court is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State v. McCormick, 166 Wn.2d 689, 706, 213 P.3d 32 (2009).

ER 801(d)(2) provides

A statement is not hearsay if . . . the statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party . . .

- a. **The court found that Mr. Haas failed to provide prior approval when moving to a new address based on the defendant's admissions, the inadequacy of his explanation and prior rulings before the court, not the DOC report.**

Mr. Haas's attorney was his agent, acting with the scope of his authority. After the prosecutor indicated that he had been informed by Mr. Haas's counsel that he was admitting with explanation, Mr. Haas's attorney confirmed that the issue was "that DOC is trying to violate him for a condition that don't necessarily have the right to impose anyway." Later, when asked to clarify if his client was admitting the allegation but providing an explanation, counsel for Mr. Haas confirmed that he was:

I mean technically he is acknowledging but I do think what he is trying to articulate is that he is trying to do his very best to maintain compliance

The defendant himself also acknowledged that he did not obtain permission for his new residence until after he moved there, "And so I moved and Monday - - I moved on the weekend; Monday I told her where I was, what the address was." RP 11-12.

Similarly, Mr. Haas's attorney confirmed with the court that the defendant was, in fact required to receive approval prior to moving:

I have in front of me the standard conditions of probation, which he refused to sign but nonetheless were provided to him, and one of them is "obtain written permission from the community corrections officer," or "notify the community corrections officer before changing residence or employment."

MR. FRANKLIN: Right.

RP 6-7. The record provided a sufficient basis to find that the defendant failed to obtain permission to reside at a new address before moving to that address.

The court did include some details in its ruling that appear to have been based on information in the DOC report. When the defendant objected to consideration of that report, the court made clear that its decision was not based on the information in the report. Instead, the court was explicit that it was Mr. Haas's probation based on his admissions, the inadequacy of his excuse and his past violation of the conditions of sentence:

Okay, so that one [the prior violations that formed the basis for the first revocation of probation] has already been adjudicated, the first probation violation, and I don't even need the underlying facts to look to the record here and find that Mr. Haas's probation has already been violated once, and this is the second time - - - this is the second time with the same explanation or excuse or whatever you want to call it, that the department doesn't have the authority to supervise him in this way, and I believe that it was made perfectly clear in the judgment and sentence and in the conditions of probation that your client refused to sign, that they do have that authority, so I am going to violate your probation, Mr. Haas, because I am finding that you have intentionally violated the conditions of your probation.

RP 21.

b. The court found that the defendant failed to report based on the defendant's admissions and prior rulings before the court, not the DOC report.

The State alleged that Mr. Haas failed to report. Mr. Haas's counsel admitted that he failed to report:

Yes, he didn't go in when he was reported, but he also knew that they were going to arrest him when he wanted to be able to come to court and address this with the court rather than have to be arrested and sit in jail for some time before he got a hearing.

RP 10. There was a sufficient basis in the record for revocation.

2. THE DEFENDANT FAILED TO PRESERVE HIS OBJECTION.

Throughout the hearing, Mr. Haas and his counsel confirmed that they were admitting the allegations in the DOC report. Had they indicated that they were denying the allegations, the State would have had the opportunity to call Mr. Haas's CCO and the court would have had the opportunity to hear from her. Counsel for Mr. Haas only objected to consideration of the report after the court ruled against him. Appellant should not be rewarded for gambling on the outcome of their arguments and then objecting after losing.

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and (1) *Objection*. In case the ruling is one admitting evidence, a timely objection or motion to strike is made, stating the specific ground of objection, if the specific ground was not apparent from the context;

ER 801(d). A defendant "cannot gamble on the verdict of the jury and seek relief thereafter in the event the verdict is unfavorable to him." Nelson v. Martinson, 52 Wn.2d 684, 690, 328 P.2d 703 (1958).

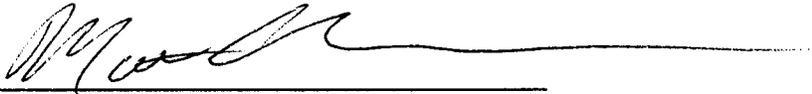
D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the revocation of Mr. Haas's suspended sentence.

DATED this 26th day of March, 2010.

Respectfully submitted,

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,)
)
Respondent,) No. 63979-0-I
)
vs.)
) CERTIFICATE OF SERVICE
JEFFREY HAAS,)
)
Appellant.)

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

On this day I caused to be delivered via ABC Legal Messenger Service, a copy of the Brief of Respondent and this Certificate of Service, with instructions to serve said documents on the following parties by 4:00 p.m. on March 29, 2010:

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March 26, 2010

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