

059109-3

0591

NO. 65969-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER MAZDRA,

Appellant.

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

The Honorable Vickie I. Churchill, Judge

2018 FEB 23 PM 4:00

BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issue Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	5
THE COURT ERRED IN REVOKING MAZDRA’S SSOSA BASED ON A FAILURE TO COMPLETE SEX OFFENDER TREATMENT.	5
a. <u>Mazdra Did Not Fail to Complete Treatment</u>	6
b. <u>The Revocation Must Be Reversed Because It Was Based on Facts Unsupported by the Record</u>	8
D. <u>CONCLUSION</u>	10

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Badger
64 Wn. App. 904, 827 P.2d 318 (1992)..... 8

State v. Dahl
139 Wn.2d 678, 990 P.2d 396 (1999)..... 8

State v. Dixon
159 Wn.2d 65, 147 P.3d 991 (2006)..... 8

State v. Hescoek
98 Wn. App. 600, 989 P.2d 1251 (1999)..... 9

State v. Hill
123 Wn.2d 641, 870 P.2d 313 (1994)..... 6

State v. Mallory
69 Wn.2d 532, 419 P.2d 324 (1966)..... 9

State v. S.E.
90 Wn. App. 886, 954 P.2d 1338 (1998)..... 6

FEDERAL CASES

Morrissey v. Brewer
408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)..... 8

RULES, STATUTES AND OTHER AUTHORITIES

Former RCW 9.94A.670 (2005)..... 5, 6

RCW 9.94A.670 5, 6

RCW 9.94A.712 5

RCW 9.94A.720 5

A. ASSIGNMENTS OF ERROR

1. The court erred in finding appellant failed to complete sex offender treatment. CP 8.¹

2. The court erred in revoking appellant's Special Sex Offender Sentencing Alternative (SSOSA) based on a factual error. CP 8.

Issue Pertaining to Assignments of Error

The court found several violations of the conditions of appellant's suspended sentence, including failure to complete sex offender treatment, and revoked his SSOSA. Appellant was not terminated from treatment and never missed a session. Did the court err in revoking appellant's SSOSA based in part on a finding unsupported by the record?

B. STATEMENT OF THE CASE

In 2005, the Island County prosecutor charged appellant Christopher Mazdra with three counts of third-degree rape of a child. CP 122. After an evaluation, Mazdra was found competent to stand trial. Supp. CP² ___ (Sub no. 44, Order Declaring Defendant Competent, 1/13/2006). The 14-year-old complaining witness testified she had consensual sex with Mazdra, then age

¹ A copy of the court's Order Revoking Sentence, including the findings of fact, is attached as an appendix to this brief.

² A supplemental designation of clerk's papers was filed on February 22, 2011.

24, on three occasions and considered him her boyfriend. 1RP³ 4-14. A jury found him guilty, and the court imposed a special sex offender sentencing alternative (SSOSA) in May 2006. CP 80, 89. His 53-month sentence was suspended on condition that he serve 9 months actual confinement, abide by conditions of community custody and engage in treatment. CP 80, 89, 95, 98.

Due to his cognitive disabilities and lack of transportation, Mazdra had difficulty obtaining work and finding a treatment provider as required. Supp. CP ____ (Sub no. 120, Status Report, 2/27/2007). The State's first motion to revoke Mazdra's suspended sentence because he was not yet in treatment or employed was denied in November 2006. Supp. CP ____ (Sub no. 104, State's Motion to Revoke Suspended Sentence, 10/25/2006); Supp. CP ____ (Sub no. 108, Minutes, 11/9/2006).

Since the summer of 2006, Mazdra had tried to obtain the Department of Corrections' approval for a sponsor to accompany him to church so he could worship. Supp. CP ____ (Sub no. 120, Status Report, 2/27/2007). When that approval was not forthcoming, he began attending church in the company of informed adults. *Id.*; CP 60, 70-71. In March 2007, the State again moved to revoke based on reports of Mazdra's attendance at church and contact with minors there. Supp. CP ____ (Sub no.

³ There are four volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Feb. 9, 2006 and Feb. 10, 2006; 2RP – May 18, 2006; 3RP Aug. 19, 2010.

124, Motion to Revoke Suspended Sentence, 3/9/2007). The court held hearings but did not revoke the SSOSA, opting to continue Mazdra on house arrest in his parents' home instead. Supp. CP ____ (Sub no. 116, Order Establishing Conditions of Release, 2/14/2007); Supp. CP ____ (Sub no. 126, Minutes, 3/15/2007); Supp. CP ____ (Sub no. 132, Minutes, 5/9/2007).

In September 2007, the State again filed notice Mazdra violated conditions of his suspended sentence by stopping at a 7-11 store to buy food on the way to his treatment rather than proceeding directly there as required. CP 47, 49. The court continued Mazdra on house arrest but did not revoke the SSOSA. Supp. CP ____ (Sub no. 145, Minutes, 11/15/2007). In February 2008, the court held a hearing on the church violation from February 2007 and the 7-11 store violation from September 2007. CP 38. The court found the violations occurred and as a sanction ordered Mazdra to remain on house arrest until his Community Corrections Officer (CCO) approved his safety plan. CP 38-39.

During his four years of treatment, Mazdra never missed even one session and was always in compliance with his treatment. CP 21, 23, 25, 27, 30, 33, 36, 40, 43, 45, 51, 53, 57; Supp. CP ____ (Sub no. 133, Monthly Progress Report, 6/4/2007); Supp. CP ____ (Sub no. 153, Monthly Progress Report, 4/7/2008). His treatment provider concluded he understood some of the dynamics of his offenses and accepted the law. CP 24. His cognitive

deficits, however, prevented Mazdra from being able to generalize his knowledge to everyday living. CP 21. His provider concluded he could not be considered a “treated” sex offender, but should be given credit for successfully completing the program. CP 22, 24.

In July 2010, the State filed a notice of violations alleging Mazdra went to Burger King once in March and once in April, in violation of the prohibition on his frequenting places minors are known to congregate. He did so with an adult who knows he is not to contact minors and there was no indication he did so. CP 17. The State also alleged Mazdra accessed the Internet without his parents’ supervision and created an account on a social networking site, both in violation of his conditions of community custody. CP 17-18. Finally, in a supplemental notice, the State alleged he violated his conditions by engaging in a sexual relationship without prior approval by his treatment provider and CCO. CP 11. His partner was an adult woman with an 18-year-old daughter. CP 11. Mazdra admitted these violations. CP 11, 17-18; 3RP 14-15.

At the revocation hearing, the court stated its concern that, so close to the end of his treatment, Mazdra was still making basic errors and revoked the SSOSA. 3RP 28. The court’s written order lists six factual findings as grounds for the revocation including “Failure to complete State Certified Sex Offender Treatment as ordered by the court in Island County on 5-18-06.”

CP 8. Mazdra appeals his 2006 conviction and the 2010 order revoking his SSOSA. CP 1.

C. ARGUMENT

THE COURT ERRED IN REVOKING MAZDRA'S SSOSA BASED ON A FAILURE TO COMPLETE SEX OFFENDER TREATMENT.

Under the SSOSA law, a first-time offender's sentence may be suspended and he may be released into the community on the condition that he complete treatment and abide by conditions of release. Former RCW 9.94A.670 (2005).⁴ If the offender violates the conditions or fails to make

⁴ Former RCW 9.94A.670 (2005), in effect when Mazdra's offense was committed, applies to this case. It provides in relevant part:

(4) 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 order the offender to serve a term of confinement of up to twelve months or the maximum term within the standard range, whichever is less. . . .

(b) 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.

(c) The court shall order treatment for any period up to five years in duration.

. . .

(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.

progress in treatment, the SSOSA may be revoked and the previously suspended sentence reinstated. Id. Mazdra's SSOSA was revoked two months before the end of his 53-month community custody term. CP 7-8.

In the order revoking Mazdra's suspended sentence, the court found he violated the conditions of his sentence by, among other things, "Failure to complete State certified Sex Offender Treatment as ordered by the court in Island County on 5-18-06." CP 8. This finding is incorrect. Because the revocation is based on a factual error, it must be reversed.

a. Mazdra Did Not Fail to Complete Treatment.

A court's findings of fact are clearly erroneous and will be reversed if not supported by substantial evidence in the record of proceedings. State v. S.E., 90 Wn. App. 886, 887, 954 P.2d 1338 (1998). There is substantial evidence only where there is a "sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Here, the court erred in finding Mazdra failed to complete his court-ordered sex offender treatment because the record shows he continued to engage in treatment throughout his time in the community. CP 8.

According to his treatment provider, Mazdra never missed a single session. CP 21, 23, 25, 27, 30, 33, 36, 40, 45, 51, 53; Supp. CP ____ (Sub no.

Former RCW 9.94A.670 (2005). The current statute is substantially the same. See RCW 9.94A.670.

153, Monthly Progress Report, 4/7/2008). When the SSOSA was revoked on August 19, 2010, the most recent progress report from his provider in April stated he was in compliance and attended every single session. CP 21. He recommended Mazdra continue treatment until he completed his community custody in October. CP 22. Mazdra's record before that point was perfect; the progress reports consistently stated he was in compliance and missed no sessions. CP 21, 23, 25, 27, 30, 33, 36, 40, 45, 51, 53; Supp. CP ___ (Sub no. 153, Monthly Progress Report, 4/7/2008). There is no evidence Mazdra ever stopped religiously attending his treatment appointments.

Nor is there any indication he was terminated from that treatment involuntarily. In June 2010, Mazdra was still in treatment because the record shows, after reporting his violation to his treatment provider, the provider gave Mazdra tasks to perform and required him to increase his attendance. CP 18. According to the Supplemental Notice of Violation filed August 8, 2010 Mazdra's provider "is intensifying treatment and wants to extend treatment until August 9, 2011." CP 13. There was no evidence before the court that Mazdra stopped attending treatment at any time. There is no evidence whatsoever that Mazdra failed to complete treatment as ordered. The finding of fact to the contrary must be reversed.

b. The Revocation Must Be Reversed Because It Was Based on Facts Unsupported by the Record.

Due process requires that SSOSA revocation be “based upon verified facts.” State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999) (citing Morrissey v. Brewer, 408 U.S. 471, 484, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)). The decision to revoke a SSOSA is discretionary. State v. Badger, 64 Wn. App. 904, 908, 827 P.2d 318 (1992). However, that discretion must be “informed by an accurate knowledge” of the offender’s behavior. Dahl, 139 Wn.2d at 688 (citing Morrissey, 408 U.S. at 484). A trial court abuses its discretion when its decision is based on untenable grounds such as facts unsupported in the record. State v. Dixon, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006). Therefore, a revocation order should be reversed for insufficient evidence when the court’s findings are not supported by substantial evidence. Dahl, 139 Wn.2d at 689-90.

Reversal is require when the revocation is based even in part on an erroneous or unverified factual basis. Dahl, 139 Wn.2d at 689. In Dahl, the court improperly considered hearsay regarding two alleged violations without good cause. Id. at 687. Although there were other grounds to revoke the SSOSA, namely Dahl’s failure to make satisfactory progress in treatment, the court found the hearsay error was not harmless and he was entitled to a new hearing. Id. at 688-89. The court’s oral ruling mentioned

both the treatment and the two alleged violations. Id. However, the oral ruling “does not explain the importance of the individual incidents in her decision to revoke.” Id. at 688. Unable to determine whether the unproven facts influenced the judge’s decision, the court held Dahl was entitled to a new hearing. Id. at 688-89.

The same is true here. Neither the written order nor the oral ruling makes clear to what extent the court relied on its erroneous factual finding that Mazdra failed to complete treatment. CP 7-8; 3RP 27-28. The court did not indicate whether its decision would be the same if some, or even one, of the stated grounds for revocation were absent.

The State may argue the court’s oral ruling did not mention a failure to complete treatment but only mentioned the various violations. But a court’s oral opinion is not a finding of fact. State v. Hescoek, 98 Wn. App. 600, 605, 989 P.2d 1251 (1999). An oral opinion is merely an expression of the court’s informal opinion when rendered. Head, 136 Wn.2d at 622. An oral opinion is not binding unless it is formally incorporated in the written findings, conclusions and judgment. Id. at 619 (citing State v. Mallory, 69 Wn.2d 532, 533, 419 P.2d 324 (1966)). In this case, when the court committed the basis for the revocation order to writing, it relied on a factual error. That factual error requires reversal.

D. CONCLUSION

Because the order was based on facts unsupported by the record,
Mazdra requests this court reverse the order revoking the SSOSA.

DATED this 23^d day of February, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC


JENNIFER J. SWEIGERT

WSBA No. 38068
Office ID No. 91051

Attorney for Appellant

Appendix

FILED

AUG 19 2010

PATRICIA TERRY
ISLAND COUNTY CLERK

IN THE SUPERIOR COURT FOR ISLAND COUNTY, WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

NO. 05-1-00158-6

Vs.

ORDER REVOKING SENTENCE/
WARRANT OF COMMITMENT

CHRISTOPHER ALLEN MAZDRA,

Defendant.

I. HEARING

1.1 The court received a petition for an order revoking special sex offender sentence alternative for the defendant, Christopher Mazdra

1.2 This matter was heard on August 19, 2010.

1.3 Present were:

Defendant: Christopher Mazdra

Defendant's Attorney: Nancy Neal

Deputy Prosecuting Attorney: Eric Ohme

Other:

1.4 The court considered:

~~A violation report~~ ^{violation reports} dated: August 10, 2010 and June 23, 2010. *& see court's file.*

Affidavit(s) from:

~~Testimony of Lisa Lee~~

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

II. FINDINGS

The court FINDS that:

2. The defendant has failed to comply with the requirements or conditions of sentence as follows:

Failure to complete State Certified Sex Offender Treatment as ordered by the court in Island County on 5-18-06.

Failing to comply with sexual deviancy treatment by engaging in sexual relations without prior approval from therapist on or about May 3, 2010 until August 2, 2010.

Being at a place minors are known to congregate on or about March 15, 2010.

Being at a place minors are known to congregate on or about April 1, 2010.

Failing to comply with sexual deviancy treatment by accessing the internet without proper approval and/or supervision on or about March 1, 2010 until May 7, 2010.

Failing to comply with sexual deviancy treatment by accessing a social networking site on the internet on or about March 1, 2010 until May 7, 2010.

ORDER

On the basis of the foregoing findings, IT IS ORDERED:

[] The sentence entered on May 18, 2006 is still in effect but modified in the following manner:

The special sexual offender alternative sentence is VACATED. The order suspending the execution of the sentence issued on May 18, 2006 is revoked AND SENTENCE EXECUTED.

Defendant shall be taken into custody immediately.

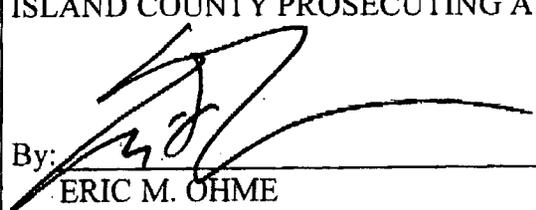
Credit is given for time served *prior to the granting of the SSOSA*
May 18, 2006

1 Dated 8-19-10

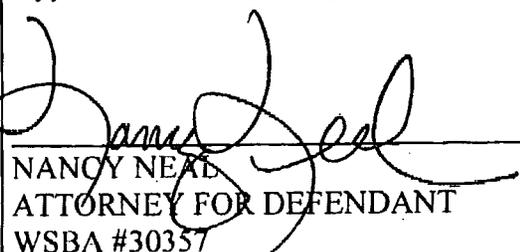
2
3 
4 _____
5 JUDGE/COMMISSIONER OF THE COURT

6
7
8 Presented by:

9
10 GREGORY M. BANKS
11 ISLAND COUNTY PROSECUTING ATTORNEY

12 
13 By: _____
14 ERIC M. OHME
15 DEPUTY PROSECUTING ATTORNEY
16 WSBA # 28398, OIN 91047

17
18
19 Approved for Entry/Copy Received:

20 
21 _____
22 NANCY NEAL
23 ATTORNEY FOR DEFENDANT
24 WSBA #30357

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 65969-3-1
)	
CHRISTOPHER MAZDRA,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 23RD DAY OF FEBRUARY, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] ISLAND COUNTY PROSECUTING ATTORNEY
P.O. BOX 5000
COUPEVILLE, WA 98239

- [X] CHRISTOHER MAZDRA
DOC NO. 891924
MONROE CORRECTIONAL COMPLEX
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF FEBRUARY, 2011.

x 