

70304-8

70304-8

NO. 70304-8-I

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

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STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER S. NICHELIN,

Appellant.

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BRIEF OF RESPONDENT

---

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## **I. INTRODUCTION**

The defendant is appealing his termination from drug court for using Kratom. As appendices to his appellate brief, he attached materials from the Internet discussing Kratom. He also filed a motion for the court to consider these materials. The State filed a response to the motion, arguing that Internet articles and blogs are not appropriate subjects for judicial notice. The Commissioner referred the motion to the panel that will consider the appeal on the merits. The State's motion to modify this ruling was denied.

As a result of these proceedings, it remains unclear whether the court will consider the materials in the appendices to the appellant's brief. Consequently, the statement of facts and argument in this brief will be in two parts. The first part will discuss the facts in the record. The second part will discuss the materials in the appellant's appendices. If this court refuses to consider the appendices, the references in this brief to those materials should be deemed withdrawn.

## **II. ISSUES**

(1) As part of the conditions for participation in drug court, the defendant was required to disclose his use of any drug. On the advice of medical personnel, he used Kratom to help him sleep.

The defendant characterized Kratom as “a natural substance marketed as an alternative medicine.” He did not disclose his use to the treatment team. When the defendant’s use of Kratom was discovered, he falsely claimed that he had not used it for six months. Does this evidence support the defendant’s termination from drug court for using Kratom and being dishonest about that use?

(2) At the termination hearing, the court inquired if it could take judicial notice concerning Kratom. Defense counsel agreed that it was proper to take judicial notice of “the facts of Kratom itself based on some reliable source.” In its oral ruling, the court said that any cursory research concerning Kratom would have alerted the defendant to the fact that it is a mood-altering substance. The defendant did not dispute this fact or request any information concerning the sources that the court had consulted. Can a challenge to the court’s use of judicial notice be raised for the first time on appeal?

(3) Did the court’s description of the facts that it judicially noticed satisfy the constitutional requirement that the court disclose the evidence on which it relied?

### **III. STATEMENT OF THE CASE**

#### **A. FACTS IN THE RECORD.**

On May 22, 2010, the defendant (appellant), Alexander Nichelin, was arrested for possessing and using stolen credit cards. 1 CP 75-78. On July 1, 2011, an information was filed charging him with three counts of second degree identity theft and one count of second degree possession of stolen property. 1 CP 79-80.

On March 14, 2012, the defendant entered into an agreement to enter Adult Drug Treatment Court (ADTC).<sup>1</sup> 1 CP 69-74 (Appendix I). The agreement included the following provisions:

4. I must follow the treatment plan as developed by the ADTC Treatment Provider.

...

16. I agree to abstain from any use or possession of alcohol, drugs, or drug paraphernalia. If any drugs are prescribed for me by a doctor, I will immediately inform my treatment provider and provide the required documentation.

1 CP 72 (App. I at 4).

Two other documents clarified the requirements of this agreement. First, the defendant was given a list of "General Adult

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<sup>1</sup> This is also called CHART, for Choosing Health Alternatives – Recovery and Treatment. Ex. 6 at 3.

Drug Court Program Expectations.” He signed this list and initialed each paragraph. One of the paragraphs stated:

I am aware that I will be expected to abstain from **all use of alcohol and other drugs**, except medications prescribed by dentist or doctor... Use of all mind and mood altering medication requires completion of the ADTC Medication Form **prior** to use. I am aware that all mind and mood altering substances, poppy seeds, medication (such as Nyquil) which contains alcohol and products containing ephedrine (found in sinus and cold allergy meds & an ingredient in amphetamine and methamphetamine) are not be consumed while in the program. I am aware that I must show any and all prescribed and over-the-counter medications to have approval from the ADTC Team before taking them.

Ex. 8 (Appendix II) (emphasis in original).

Second, the defendant was given a “Participant Handbook.”

Ex. 6; 3/12 RP 20-21. (Relevant portions of the Handbook are attached as Appendix III). At the front of the Handbook is a warning:

Please read this Handbook carefully

You are responsible for understanding its contents.

Your will be sanctioned if you fail to abide by the rules and requirements contained in this handbook.

Ex. 6 at 3.

With regard to drug use, the Handbook states:

You must be very careful not to ingest the following:

...

3. "Natural" or herbal remedies or supplements.
4. Over the counter or prescription medicines without prior approval by your treatment provider.

...

6. Any mind or mood altering substances.

...

Read labels and ask question before you put a substance in your body. Claiming that you did not know what was in something **will not** be accepted as an excuse. If you receive a positive UA because you used one of the above and failed to follow the directions of your treatment counselor or the ADTC team, you will receive a sanction or be terminated from the program. Be aware of what you are putting into your body. **If you have questions, ask your treatment counselor FIRST!**

Ex. 6 at 10-11 (emphasis in original).

With regard to violations, the agreement contained the following provisions:

### **SANCTIONS**

I understand that if I fail to follow any of the terms of this agreement, the ADTC Judge may impose sanctions on me, which can include, but are not limited to:

- Termination from the program

...

**PROCEDURE ON DEFENDANT'S BREACH OR  
FAILURE TO COMPLY WITH THE ADTC  
PROGRAM**

The prosecutor reserves the right to prosecute the Defendant upon any termination from ADTC in accordance with the procedures in State v. Marino, 100 Wn.2d 719, 647 P.2d 171 (1984) and State v. Kessler, 75 Wn. App. 634, 879 P.2d 333 (1994).

I understand that I will have the right to a hearing by a drug court judge who was not party to the decision to terminate me, as to whether I did the act which prompted the team to decide to terminate me, but whether termination is the appropriate sanction lies in the sole discretion of the team, and cannot be reviewed at the due process hearing.

1 CP 73 (App. A) at 5.

While the defendant was in the program, the drug court held regular weekly or bi-weekly review hearings. 2 CP 100-22. On five occasions, the court imposed sanctions of community service or jail. 2 CP 121 (1 day work crew), 115 (2 days jail), 114 (4 hours community service), 107 (8 hours community service), 101 (8 hours community service). These included sanctions for a positive UA, missing a treatment session, and failing to complete community service. 4/12 RP 36-38.

In November, 2012, a UA detected that the defendant had used Kratom. The Drug Court team terminated him based on the following violations:

1. The defendant used the substance Kratom while he was participating in Drug Court. The defendant tested positive for Kratom on 11/1/13.

2. The defendant was dishonest with the Court and the Drug Court team during his participation with Drug Court. The defendant was dishonest with the Drug Court Team regarding his use of Kratom.

1 CP 64.

The defendant exercised his right to a hearing before a different judge. In his pre-hearing memorandum, he described Kratom as “a natural substance marketed as an alternative medicine.” He argued that taking a “natural legal substance” was not a violation of the drug court contract. 1 CP 60-63.

At the hearing, the primary witness was Karla Rasmussen, the drug court coordinator. She testified that Kratom is an addictive mind and mood-altering substance. 3/12 RP 27. They did not normally test for it because the test is expensive. They tested in this case because they heard a rumor that the defendant was involved with Kratom. 3/12 RP 27-28.

When the defendant was questioned about the positive test result, he said that “someone in his doctor’s office had recommended Kratom to him as a sleep aid and that he had been having problems sleeping so he took it for that.” The defendant told Ms. Rasmussen that he had used Kratom six months before. Ms.

Rasmussen was then told by the testing lab that Kratom is only detectible for three to five days. When confronted about this, the defendant admitted that he had used Kratom within the same month. 3/12 RP 29-32, 54.

The defendant wrote letters to the drug court treatment team begging to stay in the program. In these letters, he repeatedly apologized for not being honest about his use of Kratom:

I'm truly very sorry for not coming clean about Kratom. I was afraid, and when I get afraid I lie. I don't want to be afraid anymore! I want to tell nothing but the truth so help me God!

Ex. 2.

I am honestly sooo heart broken after not owning my own telling you the truth about Kratom. I am truly sorry John. I don't like to lie. I never have – but I still do.

Ex. 3.

I am truly sorry for not telling you about the Kratom I took. I was afraid for my life, so I held the truth and lied. Please Laura I'm asking for your help. I am a new man today because of this program. I'm sorry I lied.

Ex. 4.

I am truly sorry for not owning my own and being honest about that supplement Kratom. I Alexander Nichelin, have struggled with honesty my whole life. I have been more honest today than ever in my life. But not honest enough. Please help me with this.

Ex. 5.

At the termination hearing, the defendant called two witnesses to testify to his progress in drug court. 3/12 RP 43-47, 67-71. He did not testify himself. He presented no evidence contradicting Ms. Rasmussen's characterization of Kratom.

After hearing the testimony, the court asked defense counsel if he would "have the ability to take judicial notice of what I know of Kratom." Counsel responded, "I don't know how much the Court actually does know of Kratom, so I'd ask if the Court does take judicial notice that it be only the facts of Kratom itself based on some reliable source." 3/12 RP 77-78. The court decided to review the exhibits and testimony before ruling. 3/12 RP 80.

Two days later, the court announced its ruling. The court began by ruling that "the positive UA for Kratom is a violation, and that violation has been proved by a preponderance of the evidence." The court then went on to consider whether this violation justified termination. In making this decision, the court balanced the violation, the defendant's history, the goals of the drug court, and post-violation behavior. 3/14 RP 2-4.

The court pointed out that the defendant's use of Kratom had been recommended "from his doctor's office."

Now, it is clear to me that some research would have had to have been conducted to follow through on this recommendation from his doctor's office. If somebody is going to tell me that I need to use Kratom or I should look into it, I'm going to say what is it, where can you find it, what form does it take, what do you do with it? That's a logical assumption in this case.

Any cursory research would have alerted Mr. Nichelin to the fact that Kratom is a mood-altering substance. In fact, the testimony was that the doctor's office made the recommendation for the express purpose of changing his mood, i.e., to deal with his anxiety. The doctor recommended the substance to alter his current mood. The use of Kratom should have been vetted through the drug court team and it should have been vetted with his treatment provider.

3/14 RP 5. The court therefore ruled that termination was the appropriate remedy. 3/14 RP 6. The defendant was subsequently convicted at a stipulated trial.4/10 RP 3-4.

#### **B. INFORMATION IN THE APPENDICES TO THE APPELLANT'S BRIEF.**

The appellant has attached three appendices to his brief.<sup>2</sup> Appendix A is an article from the online version of Forbes magazine. The article describes the effects of Kratom:

The effect of the drug mimics that of opiates, ranging from sedation to pain reduction to intense euphoria. It also carries with it a host of opiate side effects,

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<sup>2</sup> The materials attached to the brief include comments by various readers. Subsequently, however, the appellant clarified that he "asks the Court to consider only the articles themselves, not the posts of various readers following said articles." Reply to State's Response to Motion to Consider Materials in Appendices at 2.

including nausea, dizziness, constipation, and in worst cases hallucinations and delusions.

The article goes on to cite a study indicating that Kratom may have addictive effects. The article mentions, however, that supporters “argue that the substance has been used for centuries as a safe means to alleviate pain, boost energy and reduce anxiety.”

Appendix B is another post by the same author on the Forbes website. He said that Kratom supporters had told him about the drug's beneficial effects:

Several Kratom supporters who commented and wrote to me said that the substance had helped them kick addictions to opiates -- in some cases after many years of taking the drugs for tremendous pain. Others said that it helped them get off anti-depressants and anti-anxiety medications. Some said that taking Kratom provides steady energy without increased anxiety. In general, supporters credited Kratom with remarkable benefits without side-effects.

Based on these comments, the author decided to conduct a “personal evaluation” of Kratom by trying it himself.

Appendix C is a post by the same author on his own website. The author explained that because he had accepted free samples of Kratom, “I felt it was no longer ethical to write the follow-up article on Forbes – a venue for which I am paid to write.” He then described the effects of Kratom on him:

My overall takeaway is that Kratom has a two-tiered effect. Initially it provides a burst of energy very similar to a strong cup of coffee. Unlike coffee, however, the energy I derived from Kratom was longer-lasting and level. My experience with coffee is that the initial burst is strong but it tapers and descends rapidly, leading to the well-known caffeine crash. The energy from Kratom, on the other hand, would often last for three or four hours, but was subtle enough that at no point did I feel that I was jumping out of my skin. I also did not experience an energy crash with any of the Kratom products I sampled.

The second effect was relaxing, but fell short of being sedating. I never felt sleepy while taking Kratom, but I did experience a level relaxation that was pleasant, and balanced out the initial energy-boosting effects nicely.

#### **IV. ARGUMENT**

##### **A. THE DEFENDANT WAS PROPERLY TERMINATED FROM DRUG COURT FOR BEING DISHONEST AND BY USING AN UNAPPROVED DRUG.**

###### **1. Evidence In the Record Establishes That Kratom Is A Drug.**

The defendant claims that there was a lack of evidence to support the violation. In evaluating a termination from drug court, the trial court's function is similar to evaluating alleged probation violations. State v. Cassill-Skilton, 122 Wn. App. 652, 658, 94 P.3d 407 (2004). At a probation revocation hearing, "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." City of Aberdeen v. Regan, 150 Wn.2d

103, 108 ¶ 8, 239 P.3d 1102 (2010). The evidence in the present case satisfies this standard.

The defendant was terminated from drug court for two violations: (1) using Kratom; (2) being dishonest regarding his use of Kratom. 1 CP 64. With regard to the second violation, the defendant's brief presents no argument. The record clearly substantiates this violation. When confronted about his use of Kratom, the defendant initially told the drug court coordinator that he had used it six months before. He later admitted that he had used it the same month. 3/12 RP 31-32, 54. His letters to treatment staff contained repeated apologies for his dishonesty. Ex. 2-5. Honesty is a basic expectation of the treatment plan, and dishonesty is one of the most common reasons for termination. 3/12 RP 34-35.

The defendant does challenge the evidence that he violated the treatment plan by using Kratom. He claims that there was no evidence that Kratom is a mind or mood altering substance. Such evidence was not necessary. Under the drug court agreement, the defendant promised to abstain from the use of *any* drug. 1 CP 72 ¶ 16. The participant handbook clarified that this meant what it said. It included not only over-the-counter medications, but also "natural"

or herbal remedies or supplements.” Ex. 6 at 11. The question is thus whether Kratom is a “drug.”

A “drug” is any substance used as a medicine or in the composition of medicines for internal or external use, and a “medicine” is any substance or preparation used in treating disease. Hence, the term “drugs” embraces patent or proprietary remedies possessing or reputed to possess curative or remedial properties sold and used for medicines. This is true irrespective of whether such remedies contain poisonous ingredients, or whether they may be purchased without any direction from a physician, or whether they can be obtained at retail stores generally. Calling drugs domestic or family remedies does not rob them of their character as medicines.

Kelly v. Carroll, 36 Wn.2d 482, 488, 219 P.2d 89 (1950).

Under this definition, it was undisputed that Kratom is a “drug.” The defendant’s own pre-hearing memorandum described Kratom as “a natural substance marketed as an alternative medicine.” 1 CP 60. Moreover, the defendant specifically used Kratom for its medicinal qualities. He told the drug court coordinator that “someone in his doctor’s office had recommended Kratom to him as a sleep aid.” 3/12 RP 30. If a substance is recommended by medical personnel for treatment of a medical condition, it is a “drug.” Under the rules of the ADTC, a participant cannot use *any* drug without notifying the treatment team and obtaining permission.

When the defendant failed to do so, he violated the drug court agreement and subjected himself to termination.

Even if the State was required to prove that Kratom is a mind or mood altering substance, it provided such proof. The drug court coordinator testified that Kratom is a “mind and mood altering [substance].”<sup>3</sup> Earlier in the hearing, defense counsel objected to similar testimony based on lack of foundation. The prosecutor then elicited testimony concerning the witness’s basis of knowledge. After this foundation was laid, the witness repeated the testimony, and defense counsel did not object. 3/12 RP 26-27. When evidence is admitted without objection, it may be considered by the fact-finder and on appeal. Matthias v. Lehn & Fink Products Corp., 70 Wn.2d 541, 550, 424 P.2d 284 (1967).

Nor was this the only evidence concerning the mind or mood altering characteristics of Kratom. As already pointed out, the defendant said that he was advised to take the drug to help him sleep. Sleep is a profound alteration of a person’s mental state. Furthermore, the fact-finder could infer that helping a person sleep is usually accomplished by increasing relaxation or relieving anxiety

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<sup>3</sup> She initially said “medication,” but corrected that word to “substance.” 3/12 RP 27.

– both of which involve an alteration of mood. The evidence at the hearing amply supports a finding that Kratom is a mind and mood altering substance.

## **2. The Information Submitted By The Defendant On Appeal Confirms That Kratom Is A Drug.**

If the court considers the appendices to the appellant's brief, they provide further support for the trial court's findings. The Forbes article set out in Appendix A says that the effect of Kratom "mimics that of opiates, ranging from sedation to pain reduction to intense euphoria." These are, of course, all alterations of mind and mood. The Forbes post in Appendix B quotes the views of supporters that Kratom relieves anxiety and depression and provides steady energy. These are still alterations of mind and mood.

The information most favorable to Kratom appeared in the blog post set out in Appendix C. This blog is an account of the author's personal experiences with Kratom. Such information is essentially useless. As the author points out, the effects of Kratom vary based on the individual, the dosage, and the type of Kratom that is used. A substance that produces a mild effect in one person could produce a severe effect in another person, especially if the other person is using a different preparation or a different dosage.

Even looking at the effects in the best light, the author said that it produces a burst of energy followed by relaxation. A burst of energy is an alteration of mind and mood, as is relaxation. Thus, even this favorable account of Kratom confirms what the witness testified and the trial court found – Kratom is a mind and mood altering substance.

The requirements of the Snohomish County ADTC contract are strict. It does not matter whether a drug is powerful or mild, harmful or beneficial, or legal or illegal. *All* drugs, and *all* mind and mood altering substances, must be approved in advance by the treatment team. 1 CP 72; ex. 8. The appendices to the appellant's brief confirm that the use of Kratom violated the drug court contract.

**B. THE TRIAL COURT PROPERLY TOOK JUDICIAL NOTICE THAT KRATOM IS A MIND AND MOOD ALTERING SUBSTANCE.**

**1. When A Defendant Agrees That The Trial Court Can Take Judicial Notice, He Cannot Challenge That Action For The First Time On Appeal.**

The defendant next claims that the trial court erred in taking judicial notice of facts concerning Kratom. Any error in this regard was invited and cannot be raised for the first time on appeal.

The invited error doctrine prohibits a party from setting up an error at trial and then complaining of it on appeal. State v.

Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990). “The invited error doctrine applies only where the defendant engaged in some affirmative action by which he knowingly and voluntarily set up the error.” State v. Phelps, 113 Wn. App. 347, 353, 57 P.3d 624 (2002). Here, the court specifically asked if it could take judicial notice concerning Kratom. Defense counsel responded that “if the Court does take judicial notice that it be only the facts of Kratom itself based on some reliable source.” 3/12 RP 77-78. Defense counsel thus invited the court to consult a “reliable source” to determine “the facts of Kratom itself.” On appeal, the defendant cannot complain that the court did what it was invited to do.

The evidence rules recognize the possibility of disputes concerning what facts should be judicially noticed:

A party is entitled upon timely notice to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

ER 201(e).

The trial court complied with this rule. It gave advance notice of its intention to take judicial notice. In its ruling, it informed the parties what facts it had noticed. 3/14 RP 5. The defendant raised no objection at either point.

Under ER 201, disputes concerning judicial notice should be resolved at the trial level, not for the first time on appeal. The lack of any objection prevents meaningful appellate review. Because the defendant never disputed any of the facts relied on by the trial court, that court had no reason to disclose the sources on which it relied. As already pointed out, when evidence is admitted without objection, it may be considered by the factfinder. Matthias, 70 Wn.2d at 550. Absent any timely objection to facts judicially noticed, those facts should be considered as part of the record.

**2. The Information Submitted By The Defendant On Appeal Confirms The Accuracy Of The Facts Judicially Noticed By The Court.**

If this court considers the challenge to judicial notice for the first time on appeal, the materials presented by the defendant confirm the correctness of the trial court's ruling. The defendant claims that these materials reveal a dispute concerning the properties of Kratom. That dispute is over whether it is beneficial – *not* over whether it is a mind or mood altering substance. Even supporters of the drug agree on this point:

Kratom is not without its supporters, who argue that the substance has been used for centuries as a safe means to alleviate pain, boost energy and reduce anxiety.

App. A to Appellant's Brief at 2.

Several Kratom supporters who commented and wrote to me said that the substance had helped them kick additions to opiates – in some cases after many years of taking the drugs for tremendous pain. Others said it helped them get off anti-depressants and anti-anxiety medications. Some said that taking Kratom provides steady energy without increased anxiety.

App. B at 2.

My overall takeaway is that Kratom has a two-tiered effect. Initially it provides a burst of energy very similar to a strong cup of coffee... The second-tier effect was relaxing, but fell short of being sedating.

App. C at 5.

Thus, supporters of the drug say that it relieves pain, depression, and anxiety better than opiates, anti-depressants, or anti-anxiety medications. All of these are profound alterations to mind and mood. In view of these claims, it is absurd to suggest that Kratom is no different than coffee or tea. Whether Kratom is beneficial is irrelevant. Under the rules of the ADTC, even beneficial drugs must be reported to treatment providers. The materials provided by the defendant confirm that the undisclosed use of Kratom violated the drug court agreement.

**C. THE TRIAL COURT SATISFIED DUE PROCESS BY DISCLOSING THE FACTS THAT IT JUDICIALLY NOTICED, WHERE THERE WAS NO ATTEMPT BY THE DEFENDANT TO REFUTE THOSE FACTS.**

Finally, the defendant claims that the trial court violated due process by failing to state the evidence relied on to find the violation. The due process requirements for drug court termination including “clearly stat[ing] the evidence upon which the court relied.” Cassill-Skilton, 122 Wn. App. at 658. This can be done orally or in writing. See State v. Marino, 100 Wn.2d 719, 727, 674 P.2d 171 (1984) (discussing requirements for terminating deferred prosecution). Here, the court delivered a 4½ -page oral opinion that explained in detail why the defendant’s violations warranted revocation. 3/14 RP 2-6. This satisfied the requirements of Cassill-Skilton and Marino.

The defendant claims, however, that the court was required to disclose the specific sources on which it relied for judicial notice. In a probation revocation proceeding, “[i]t is sufficient if the defendant is appraised of the reasons for and facts upon which the contemplated revocation depends and is given fair opportunity to be heard in defense, refutation, or explanation of them.” State ex rel. Woodhouse v. Dore, 69 Wn.2d 64, 71, 415 P.2d 670 (1966).

Here, the defendant was notified of the facts that the court was considering and given an opportunity to object. At no point did he contradict the court's characterization of Kratom or ask for an opportunity to refute it.

There is some scholarly dispute concerning the characterization of judicial notice. Some authorities consider it a type of evidence. Others consider it a medium of proof that is distinct from evidence. State v. Randecker, 79 Wn.2d 512, 516 n. 5, 487 P.2d 1295 (1971). Here, this distinction does not matter. If judicial notice is a form of evidence, the court disclosed its reliance on that evidence in its oral opinion. If it is considered distinct from evidence, the court disclosed the *facts* that it judicially noticed. The defendant cites no authority establishing a constitutional requirement to disclose the *sources* on which judicial notice is based, when there has been no challenge to the facts judicially noticed.

The procedure followed by the trial court satisfied constitutional requirements. It was overwhelming proved that the defendant violated the ADTC agreement by using a medicinal substance without prior disclosure. It was also overwhelming

proved that he was dishonest to the treatment team about that use.

The defendant's participation in drug court was properly revoked.

**V. CONCLUSION**

The judgment and sentence should be affirmed.

Respectfully submitted on December 23, 2013.

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12 MAR 14 PM 4:33

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SUPERIOR COURT OF WASHINGTON  
IN AND FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

NICHELIN, ALEXANDER SCOTT

Defendant.

No. 11-1-01483-5

DEFENDANT'S AGREEMENT TO ENTER  
ADTC PROGRAM, ACKNOWLEDGMENT  
OF ADVICE OF RIGHTS AND WAIVER  
OF RIGHTS

1. My true name is: \_\_\_\_\_

2. My age is: \_\_\_\_\_ My date of birth is: 12/13/1983

3. I understand I am accused of: the crime of Count 1: Second Degree Identity Theft, Count 2: Second Degree Possession of Stolen Property, Count 3: Second Degree Identity Theft, Count 4: Second Degree Identity Theft

The maximum penalty for that crime is: Counts 1-4: 5 years / \$10,000.

The prosecutor's recommended sentence in the event of termination is: 8 months (472 months)

State's Offer: Prison/Jail: 8 months Court costs, Attorney fees, \$500 crime victim's compensation, \$100 biological sample fee, restitution on charged and uncharged offenses contained in discovery (\$4891.50).

DEFENDANT'S AGREEMENTS

1. Waiver of Speedy Trial (CrR 3.3). I understand that I have the right to be brought to trial within 90 days following my arraignment date. I further understand if I do not receive a trial within this time period, this case may be dismissed with prejudice unless I agree to waive this right. By signing this petition to enter Adult Drug Treatment Court (ADTC), I hereby waive my right to a speedy trial until

3/7/14  
Trial date is set for: 6/25/2013

2. Waiver of Jury Trial (CrR 6.1) I understand I have the right to trial by jury unless I waive the right to a jury trial. I hereby waive my jury trial right and request my guilt or innocence be decided by the Judge if I am terminated from the ADTC.

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**3. Stipulation to Admissibility of Reports (CrR 4.3(g), CrR 3.5, CrR 3.6)** I wish to submit the case on the record. I understand this means that if I am terminated from the ADTC Program, a Judge will read the affidavit of probable cause and/or police reports and other materials submitted by the prosecuting authority and, based solely upon that evidence, the Judge will decide if I am guilty or not guilty of the crime(s) charged herein. I understand it is very likely the Judge will find me guilty since the only evidence the Judge will consider are the reports and other materials submitted by the prosecutor.

I understand that, by this process, I am giving up my constitutional right to a jury trial, my right to hear and question witnesses, the right to call witnesses in my behalf, the right to cross examine the state's witnesses, the right to present evidence on my behalf, and giving up the right to not to testify, at trial.

I understand I have the right to a hearing to determine the admissibility of any statements made by me in this case. At that hearing I would have the right to offer evidence and confront witnesses with respect to any such statements and the right to testify at such a hearing without waiving my right to testify at trial. I understand that, by this agreement, I am giving up my right to a hearing on the admissibility of any statements and am stipulating to the admissibility of any such statements and agreeing that the ADTC Judge may consider those statements in deciding my guilt or innocence.

I understand I have the right to a hearing to determine the validity of any search or seizure in this case. I understand that, by this agreement, I am giving up my right to contest the validity of any search or seizure and agreeing that the ADTC Judge may consider any evidence seized in determining my guilt or innocence.

If the charge(s) against me involve the possession or delivery of a controlled substance or alcohol, I further waive my right to any forensic testing of those substances and stipulate that the substance(s) or alcohol were exactly what the prosecutor has alleged they were in the charging documents.

No one has made any threats or promises to persuade me to submit this case on the record, other than the prosecutor's promises made in this Agreement.

### **ADDITIONAL AGREEMENTS**

1. It is agreed by all parties that, during the first 14 days from the date of signing this agreement, I may withdraw from the ADTC and have all my constitutional rights restored, ONLY IF I APPEAR FOR THE Final Acceptance Hearing and notify the judge. I further understand that, during this same 14 day period, any other member of the ADTC team (the prosecutor, Judge, ADTC coordinator, or ADTC treatment provider) may request my removal from the program for good cause and, if I am removed from the program during this period, all of the rights I have waived above will be restored.

In addition, I understand the Team may, at any time during the program, decide to terminate me from ADTC Court for non-compliance or my violation of any of these agreements. The termination decision will be made by the ADTC team.

If I disagree with that decision, I may request a full adversarial hearing which would be scheduled before a different judge (unless I request the ADTC judge to hear the matter) at which time the prosecutor would be required to prove the program violations or circumstances that warrant termination by a preponderance of the evidence and I would have the right to be represented by counsel at no cost if I could not afford to hire an attorney.

2. I agree to pay a non-refundable participant fee of \$50.00 a month for every month that I am deemed an active member of ADTC following my opt-in, which participant fees shall total not less than \$600, unless waived by the ADTC team. Participant fees must be paid in full prior to my successful completion

of the ADTC. If I am terminated from the program, any unpaid fees may be entered as a judgment against me and bear interest like any other judgment debt.

Payments shall be made through the  
Snohomish County Clerk's Office  
County Courthouse  
Mission Building –Floor 2  
3000 Rockefeller Avenue, M/S 605  
Everett, WA 98201

3. I agree that any failure in my treatment program, including, but not limited to: positive urinalysis tests, missed tests or out-of-range urine samples, missed treatment, missed court appearances, any failure to abide by the terms of this agreement, or commission of a new crime, may result in modification of the treatment program, revocation of my pre-trial release, or termination from the ADTC.
4. I agree to not associate with persons known to use or possess controlled substances.
5. I understand that victims may have suffered losses and, if so, are entitled to restitution. I agree to pay the total amount of restitution as outlined in the "Agreement to Pay Restitution" that will be filed separately as Appendix I to this ADTC contract. I understand that restitution shall be paid in full as soon as possible. If it is necessary that I make monthly payments on restitution, the total sum of restitution owed will be divided by the number of months I will be in ADTC (12 – 18 months). I understand these payments cannot be set up to extend beyond 18 months.
6. I understand that if I fall behind by three months in restitution payments or participant fees and I have not made arrangements to correct the situation I may be terminated from the ADTC Court program.
7. I understand and agree that while the ADTC staffing discussions usually occur in the jury room and that the team may communicate electronically about my participation those discussions and communications are not confidential and are not otherwise protected from disclosure. I also specifically agree that my name and photograph(s), including booking and graduation photos and video or still images which may be obtained during drug court sessions or graduation ceremonies may be used and disseminated in the discretion of the ADTC team without the need to obtain further permission from me, although I may also revoke this consent in writing to the ADTC at any time.
8. I also specifically waive any confidentiality pertaining to my health care or history and agree that the members of the ADTC, including the ADTC treatment providers and coordinators, may discuss those matters freely with any current or past health care provider.

I AGREE TO ENTER THE Snohomish County ADTC, and by doing so, I understand that I will have certain obligations and responsibilities and will have to follow the orders given to me by the Judge, treatment personnel, and other people involved in the ADTC.

#### **PARTICIPANT'S RESPONSIBILITIES AND AGREEMENTS**

1. I must attend all treatment and court sessions as ordered.
2. I will appear on time at all appointments in clean appropriate clothing (Shorts, cut-offs, midriff tops, bare feet, and flip flops are not acceptable clothing. No T-shirts or sweatshirts with drug or alcohol slogans.)

3. I must contact the ADTC Coordinator as directed.
4. I must follow the treatment plan as developed by the ADTC Treatment Provider.
5. I will fully participate in treatment and in all other programs (such as AA, NA, etc.) to which I am referred by the Court or the ADTC coordinator to help maintain my sobriety and obtain a law-abiding lifestyle. I understand that a failure to appear for a court date or any other breach of this agreement may result in an immediate warrant for my arrest.
6. I agree to allow inspections of my residence by the ADTC Coordinator and law enforcement. My home and the persons I live with will be available for unannounced visits by the ADTC Coordinator and law enforcement.
7. I must obey all laws and I understand that if I engage in any criminal act, I may be prosecuted for any new charge(s) and may be terminated from the program.
8. I must tell my ADTC Treatment Provider and the ADTC Coordinator before I move or change my telephone number or disconnect my telephone. If my phone is disconnected by outside sources, I must notify my ADTC Treatment Provider within 24 hours of being disconnected. I must get permission from the ADTC Coordinator before I leave the State of Washington.
9. I must inform the ADTC Coordinator within 48 hours if I change employment.
10. I must submit urine samples for testing upon request by the Court, my ADTC Treatment Provider, or the ADTC Coordinator.
11. I agree that the ADTC will rely on the chemical test results obtained in the manner that has been approved by the ADTC. If I dispute the results of the chemical test, I may request a further confirming test, however, if I test positive on the confirming test, I will not only be obligated to pay the cost of the test but may be terminated from the program based on my failure to be honest with the court about my drug use.
12. I agree to submit to a polygraph examination (lie detector), if requested by the ADTC; if the examiner indicates that I was deceptive, I agree to be responsible for the cost of such testing.
13. I understand that any attempt to falsify a urine test is grounds for immediate termination from the program and prosecution on the criminal charges against me. I understand that a missed test will be considered a positive test for drugs.
14. I understand that I must be employed, actively seeking employment, in school, or pursuing a GED, as required by the ADTC Judge.
15. I understand that the ADTC is a minimum of 12 months, and that it is the expectation that I must complete the program before 18 months have elapsed.
16. I agree to abstain from any use or possession of alcohol, drugs, or drug paraphernalia. If any drugs are prescribed for me by a doctor, I will immediately inform my treatment provider and provide the required documentation.

### **SANCTIONS**

I understand that if I fail to follow any of the terms of this agreement, the ADTC Judge may impose sanctions on me, which can include, but are not limited to:

- Termination from the program
- Community service or restitution, or work crew
- A period of incarceration in the Snohomish County Jail
- A period of time observing court proceedings
- Increased supervision and treatment requirements, such as extra treatment sessions, extra AA/NA meetings, and residential treatment.
- Being convicted and sentenced to the term prescribed by law for the original felony charge
- Other sanctions at the discretion of the ADTC Judge

I agree to sign any and all releases necessary to monitor my progress in the ADTC Program.

I understand that I must complete Phases I, II, MRT, and III, all of which have been explained to me, before I can graduate from the ADTC Program.

I will sign a consent form waiving confidentiality of any medical treatment, or social service records. If I withdraw consent, I understand that I will be terminated from the ADTC Program.

#### **PROCEDURE ON DEFENDANT'S SUCCESSFUL COMPLETION OF THE ADTC PROGRAM**

Upon the Defendant's compliance with this Agreement and successful graduation from ADTC, the prosecutor will move to dismiss the pending charges in this matter with prejudice.

#### **PROCEDURE ON DEFENDANT'S BREACH OR FAILURE TO COMPLY WITH THE ADTC PROGRAM**

The prosecutor reserves the right to prosecute the Defendant upon any termination from ADTC in accordance with the procedures in *State v. Marino*, 100 Wn.2d 719, 647 P.2d 171 (1984) and *State v. Kessler*, 75 Wn.App. 634, 879 P.2d 333 (1994).

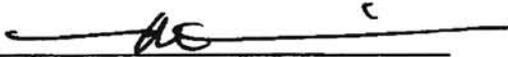
I understand that I will have the right to a hearing by a drug court judge who was not party to the decision to terminate me, as to whether I did the act which prompted the team to decide to terminate me, but whether termination is the appropriate sanction lies in the sole discretion of the team, and cannot be reviewed at the due process hearing.

I have read or have had read to me and I understand this agreement. I understand the rights I waive and do hereby knowingly waive these rights and enter into these agreements with the ADTC. I have no further questions to ask.

DATED: 3-14-12

  
ALEXANDER SCOTT NICHELIN  
Defendant

The foregoing statement was read by or to the defendant and signed by the defendant in the presence of:

  
MAX P. HARRISON, #12243  
Attorney for Defendant

The above DEFENDANT'S AGREEMENT TO ENTER ADTC PROGRAM, ACKNOWLEDGMENT OF ADVICE OF RIGHTS AND WAIVER OF RIGHTS is hereby APPROVED, and Defendant is hereby ORDERED to report today to EVERGREEN MANOR and return to Dept. 3 at 3:00 P.M.

on 3/9/12  
on 3/11/12 and  
on 3/23/12 for the Final Acceptance Hearing - ATTORNEY MUST BE PRESENT.

DATED this 14 day of MARCH, 2012.

JUDGE 

Approved for Entry:

  
JOHN E. STANSELL, #13976  
Deputy Prosecuting Attorney





**SNOHOMISH COUNTY SUPERIOR  
COURT**

**ADULT DRUG TREATMENT COURT**

**PARTICIPANT HANDBOOK**

Updated 2010

**APPENDIX III**

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## Adult Drug Treatment Court Introduction

You've been given the opportunity to participate in Snohomish County's Adult Drug Treatment Court (ADTC) a/k/a Choosing Healthy Alternatives – Recovery and Treatment (CHART). ADTC was created to give people charged with drug related felonies an opportunity to deal with their addiction to drugs and alcohol. By choosing to enter ADTC, you are being given a chance to rebuild your life. By successfully completing the ADTC program, you will have the pending felony charges(s) dismissed.

The primary purpose of the ADTC program is to provide intervention and treatment for offenders referred to ADTC who want to make positive life changes and break their cycle of addiction. You are not alone. You will meet other people who know what it feels like to be chemically dependent and you will learn the skills needed for a drug-free lifestyle.

This handbook provides information about the ADTC and what is expected of you as a participant. We encourage you to share this information with your family and friends who support your recovery. As a participant, you are expected to comply with all aspects of this handbook, the ADTC Contract and to follow all instructions given in court by the Judge.

NOTE: *The information contained in this handbook may periodically change; participants will be kept informed of any changes.*

***Please read this Handbook carefully***

***You are responsible for understanding its contents.  
You will be sanctioned if you fail to abide by the rules and  
requirements contained in this handbook.***

***Contact your ADTC Coordinator or your Treatment  
Counselor if you have questions!***

That release of confidentiality will extend to others who may be present or participate in staffing or other discussions that relate to your participation, including the possible presence of the press or public. We will take what steps we can to respect your privacy and not discuss sensitive personal information in open court.

### FINANCIAL OBLIGATIONS

You must pay a fee toward the costs associated with participation in the ADTC program. This fee is not covered by Medical Coupons or insurance. You will be required to make regular payments as set by the Court. Fees are due by the last working day of the month. Sanctions may be imposed for nonpayment. You are also required to purchase the MRT workbook.

You may be required to pay all or part of your treatment costs depending on your income level. A sliding fee scale may be used to determine any additional treatment costs. All fees and any restitution must be paid in full prior to your scheduled graduation. If you cannot make the payment, discuss this situation with your coordinator and, if possible, other arrangements (such as community service) may be made.

Restitution, if any, must be paid according to the Contract you have signed. Failure to do so may result in sanctions or termination from the program.

Additional financial obligations may also include additional urinalysis testing, and/or confirmation costs by request of the court and paying for a polygraph test if you are the one requesting the test.

### DRUG SCREENING

You are required to provide urine samples on a regular basis to monitor your progress. A same-gender treatment staff member will observe you as you provide your urine samples. At times, you may also be required to submit to other recognized drug/alcohol monitoring techniques. Urinalysis results and results of other monitoring techniques will be documented and made available to the court. Any positive urine screens, tampered samples, low creatinine, or refusal to provide a sample will be grounds for sanctions up to and including termination from the program. If you choose to use, you choose to have consequences. You will not be permitted to provide a sample if you arrive late. Plan accordingly. If you have problems producing a sample, show up early.

You must be very careful not to ingest the following:

1. Alcohol (could be in cold medicine like Nyquil, Bar-B-Que sauce etc.) and alcohol substitutes (Near Beer, etc.) that may also contain some alcohol.
2. Poppy seeds in any form (muffins, bagels, bread, salad dressing etc.)
3. "Natural" or herbal remedies or supplements.
4. Over the counter or prescription medicines without prior approval by your treatment provider.
5. Medications from Canada not sold over the counter in USA (222's etc).
6. Any mind or mood altering substances.
7. Products containing ephedrine (found in sinus and cold allergy medications).

If you receive a positive UA result because you ingested one of the above substances without prior approval, it will be treated as a positive UA and you will be sanctioned.

Read labels and ask questions before you put a substance in your body. Claiming that you did not know what was in something **will not** be accepted as an excuse. If you receive a positive UA because you used one of the above and failed to follow the directions of your treatment counselor or the ADTC team, you will receive a sanction or be terminated from the program. Be aware of what you are putting into your body. **If you have questions, ask your treatment counselor FIRST!**

Your body is YOUR responsibility. You, and only you, are responsible for everything that goes into your body; and, therefore, everything that leaves your body. This means each and every time you provide a urine sample, you will be held responsible for the test results.

If you have received a positive UA result which you believe is in error, you may request a confirmation test from the court or treatment provider; however, a sanction will be imposed if the original results are confirmed, and you will be responsible for the cost of the confirmation test(s). You will be sanctioned for any positive drug or alcohol test. Any failure to appear for testing or failure to provide a sufficient sample for testing will be treated the same as a positive test result. Any urine sample that is out of range for temperature, creatinine, PH, specific gravity or any other reason that prevents accurate measurement will be treated the same as a positive test. Any adulteration or other attempt to "beat the test" will be treated the same as a positive test result and sanctions imposed accordingly.

### PRESCRIPTION MEDICATIONS

Defendants in ADTC Court are expected to be drug free, including the use of mood or mind-altering, potentially addictive, prescription medications. Defendants with chronic pain requiring repeated use of prescription pain medication (opiate, narcotic or benzodiazepine medications) are not good candidates for the program. If you choose to participate in ADTC Court you will be required to discontinue all addictive medications.

Participants who have opted into ADTC Court and have an acute pain episode must have the ADTC *Medication* form completed by their doctor before they take any medication. The form must be given to your physician at the time of services and include the doctor's name, any medication given at time of service, medication prescribed, amount prescribed (including refills), reason for prescription, duration of treatment, and acknowledgement by the physician that you revealed that you are a substance abuser and the physician feels this is the best course of treatment. This form, with copies of the prescriptions, must be provided to your treatment counselor immediately. Participants are required to only use one physician and one pharmacist for all prescribed medications taken while in the program. Any medications may result in a change to your clean and sober date.

### TREATMENT PHASES

You are required to successfully complete all phases of treatment before graduating from ADTC.

**Phase I:** Treatment begins with either residential treatment or intensive outpatient treatment (IOP). If you're referred to residential treatment you will then attend IOP once you return. IOP meets 6 or more hours per week and you will also have individual appointments with your counselor at least once per month and more often if clinically indicated. An intensive outpatient program typically lasts about 12 weeks, but that care varies when clinically indicated. IOP is presented utilizing a variety of techniques including process activities and education based on the Living in Balance curriculum. Transition to Phase II is a clinical decision by the primary counselor and the ADTC team based on the American Society of Addiction Medicine Patient Placement criteria (ASAM PPC). Completing this phase is contingent upon regular attendance at all ADTC mandated activities, a significant period of clean drug tests, initial contact with a support group sponsor and active participation in all therapeutic activities.

**Phase II:** Participants in Phase II may attend Relapse Awareness or Prevention Group, Continuing Care group, or a combination of the two, depending on clinical need. In addition, during this phase participants will complete Moral Reconciliation Therapy (MRT). MRT group meets 1.5 hours per week and you will be required to do additional work outside of group. Progress in Phase II is contingent upon ongoing clean drug tests, regular attendance at all ADTC mandated activities, ongoing work with a support group sponsor, selection of and participation in a home group and active participation in all therapeutic activities. To complete this phase you will need to complete all 12 steps in the MRT workbook (which you will be required to purchase). Failure to maintain the objectives of this phase may result in extended time in Phase II, return to Phase I or termination.

**Phase III:** Upon completion of Phase II participants will attend Phase III until ready to graduate from ADTC. This phase includes a minimum of monthly contact with your counselor and may include as many individual appointments with your counselor or as