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Court of Appeals  
Division I  
State of Washington

NO. 73301-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

SALLYEA McCLINTON,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE PALMER ROBINSON

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. A claim is moot, and should not be addressed, if the court cannot provide effective relief. The defendant asserts that the trial court violated his due process right to confrontation by considering hearsay at his sentence modification hearing, but the defendant has already served the entire sanction imposed by the trial court. Should this Court decline to review the defendant's claim on the grounds that it is moot?

2. A defendant who fails to object to a violation of his limited due process right to confrontation, and who himself uses hearsay during argument, has waived his right, and may not later assert it for the first time on appeal. Here, the defendant failed to object to the trial court's consideration of hearsay in a sentence modification hearing on constitutional grounds, and used hearsay he elicited from the State's witness in arguing that the violations had not been proven. Is he now prohibited from asserting his limited due process right to confrontation for the first time on appeal?

**B. STATEMENT OF THE CASE**

1. PROCEDURAL FACTS.

In 1997, the defendant, Sallyea McClinton, was charged by amended Information with (i) rape in the first degree of J.A. while armed with a deadly weapon, (ii) attempted rape in the first degree of T.S., (iii) burglary in the first degree of T.S. and her daughters, and (iv) burglary in the first degree of L.D. and M.N. while armed with a deadly weapon. CP 9-11. A jury found McClinton not guilty of count four, but found him guilty of the other counts. CP 12, 23.

McClinton received standard range sentences of 134 months on the rape charge (which included the 24-month deadly weapon enhancement), 68 months on the attempted rape charge (consecutive to the rape sentence), and 42 months on the burglary charge (concurrent to the rape and attempted rape sentences), for a total sentence of 202 months. CP 13-14. He was also sentenced to community placement for two years or up to the period of earned early release, whichever was longer. CP 17. The convictions were upheld on appeal. CP 23-24.

McClinton was released from prison to begin his term of community custody in June 2013. CP 83. In September 2013, McClinton was ordered to serve 120 days of confinement for two

violations of his conditions of community custody. CP 35-36. He appealed, but later moved to dismiss his appeal as moot. CP 37, 43. In February 2014, McClinton was ordered to serve 240 days of confinement for four violations of his conditions of community custody. CP 40-41. McClinton appealed that order, challenging the Department of Corrections' authority to impose GPS monitoring on him, and this Court affirmed the trial court's rulings in a published opinion. CP 44; State v. McClinton, 186 Wn. App. 826, 829, 347 P.3d 889 (2015), review denied, \_\_\_ Wn.2d \_\_\_ (Sept. 30, 2015).

In May 2014, the trial court found that McClinton had again committed five violations of his conditions of community custody, and imposed 60 days of confinement on each violation, to run consecutively, for a total of 300 days. CP 47-48. McClinton appealed again, and was again unsuccessful. CP 49; State v. McClinton, No. 72190-9-I, 2015 WL 4521646 (Wash. Ct. App. July 27, 2015).

On February 19, 2015, and March 3, 2015, the trial court held a sentence modification hearing to address five violations of McClinton's community custody listed in a December 2014 Notice of Violation by McClinton's Community Corrections Officer (CCO).

2RP<sup>1</sup> 3-5. The trial court found that McClinton had committed all five violations, and again imposed 60 days of confinement on each violation, to run consecutively, for a total of 300 days. CP 76-77. McClinton timely appealed. CP 78.

2. SUBSTANTIVE FACTS.

a. Facts Of The Crimes.<sup>2</sup>

On September 18, 1995, McClinton followed J.A. into her apartment building and raped her at knifepoint in an elevator. CP 23, 28. On October 17, 1995, McClinton followed T.S. and T.S.'s five-year-old daughter into their apartment, dragged T.S. into a bedroom, and demanded that T.S. remove her clothes. CP 23, 31. T.S.'s thirteen-year-old daughter was already in the bedroom and called 911. CP 31. When McClinton began to remove his pants, the thirteen-year-old screamed and broke a window, and McClinton fled. CP 31. Both victims were strangers to McClinton. CP 28, 31.

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<sup>1</sup> The three volumes of the Verbatim Report of Proceedings will be referred to as 1RP (February 4, 2015), 2RP (February 19, 2015), and 3RP (March 3, 2015).

<sup>2</sup> Because the facts underlying McClinton's convictions are not at issue in this appeal, these facts are taken from this Court's 1999 opinion in McClinton's direct appeal.

b. Community Placement Violations And  
February/March 2015 Sentence Modification  
Hearing.

On December 4, 2014, McClinton met with his CCO, John Chinn, following McClinton's release from custody on December 3<sup>rd</sup> after serving a 300-day sanction for prior violations of his community placement. 2RP 5. Chinn discussed with McClinton what his reporting schedule would be and the conditions of his community custody, including the requirement that McClinton register as a sex offender and reside only at an approved residence. 2RP 6-7. McClinton told Chinn that he had not yet registered as a sex offender and was staying at the Union Gospel Mission in downtown Seattle. 2RP 6.

Chinn drove McClinton to the Union Gospel Mission and had McClinton point out which doors he typically used to enter the building and which part of the building he typically stayed in, so that Chinn could find him if necessary. 2RP 6-7. Chinn instructed McClinton that he was not allowed to stay anywhere else without approval from Chinn, and told him what to do if he was ever unable to obtain a bed at the Mission overnight (which included immediately calling Chinn's cell phone to notify him). 2RP 7-8, 14. After giving McClinton his next report date, Chinn instructed him to

go register as a sex offender, and McClinton indicated that he would. 2RP 8-9. Chinn dropped him off at the sex offender registration office and watched him go inside. 2RP 7.

McClinton reported to Chinn as instructed on December 8<sup>th</sup> and December 10<sup>th</sup>. 1RP 10. Prior to their December 10<sup>th</sup> meeting, Chinn learned from staff at the sex offender registration office that McClinton had not yet registered, despite Chinn dropping him off there on December 4<sup>th</sup>. 2RP 10. Chinn relayed this to McClinton on December 10<sup>th</sup>, and instructed him to immediately go register, and to contact Chinn the following day to verify that he had done so. 2RP 10-11. Chinn gave McClinton his cell phone number so that McClinton could call him the next day, and also instructed McClinton to report in person on December 16<sup>th</sup> for a standard weekly reporting visit. 2RP 11.

McClinton failed to register as a sex offender, failed to contact Chinn on December 11<sup>th</sup>, and did not report as scheduled on December 16<sup>th</sup> or at any point thereafter. 2RP 11-12. After he failed to report on the 16<sup>th</sup>, Chinn contacted McClinton's mother, who indicated that McClinton had spent several nights at her home leading up to December 12<sup>th</sup>, and that she had not heard from him since that date. 2RP 13. McClinton had never requested or

received authorization to stay anywhere other than the Union Gospel Mission. 2RP 14. Two of Chinn's coworkers checked the log books of the Union Gospel Mission and confirmed that McClinton had not been staying there. 2RP 21.

Chinn filed a notice of violation alleging five violations of McClinton's conditions of supervision: (1) failure to register as a sex offender on December 4, 2014; (2) failure to report on December 11, 2014; (3) failure to report on December 16, 2014; (4) failure to be available for urinalysis and breathalyzer testing since December 11, 2014; and (5) failure to obtain prior approval for living arrangements since December 10, 2014.<sup>3</sup> 2RP 10-13. McClinton's GPS tracker stopped functioning after he absconded because McClinton stopped charging it. 2RP 29.

The trial court issued a warrant for McClinton's arrest on December 19, 2014, on which McClinton was booked on January 15, 2015. CP 87; supp. CP \_\_\_ (sub 256). The trial court addressed the allegations at a sentence modification hearing on February 19 and March 3, 2015. CP 47-48; RP 2. At the hearing, Chinn testified to the facts above. RP 7-18. McClinton did not object to Chinn's testimony regarding information he received from the sex

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<sup>3</sup> For reasons unknown, the notice of violation was not formally filed and thus is not in the record on appeal.

offender registration office, but did object to Chinn's later testimony about information received from McClinton's mother, without specifying the precise basis for the objection. 2RP 10, 13.

In cross-examining Chinn, McClinton elicited hearsay regarding which program at Union Gospel Mission McClinton had been participating in, and the Mission's practice of not guaranteeing beds to particular individuals on any given night. 2RP 20-21. McClinton did not testify at the hearing or present his own witnesses. RP 19.

In argument, McClinton objected to the trial court using hearsay from staff at the sex offender registration office to determine whether McClinton had failed to register. 3RP 5-6. He argued that the State could have provided more direct evidence, and asked the court to find that particular violation not proven. 3RP 6. McClinton's only argument regarding the fifth allegation, failure to reside at an approved residence, was that there was insufficient evidence that any such violation was willful in light of the uncertainty of obtaining a bed at the Union Gospel Mission on any given night. 3RP 8-9. At no point during the hearing did McClinton assert a constitutional right to confrontation. 2RP 4-33; 3RP 5-9.

The trial court indicated that it believed it could properly consider the hearsay testimony because the rules of evidence are relaxed or do not apply at sentence modification hearings. 3RP 9-10. The trial court gave no indication that it had considered the possibility, unmentioned by either party, that McClinton had a constitutional right to confrontation. 3RP 9-11. The court found that McClinton had willfully committed all five violations and imposed consecutive sanctions of 60 days of confinement for each violation. RP 22-23, 27; CP 47-48.

McClinton finished serving his sanction and was released on August 3, 2015.<sup>4</sup> Supp. CP \_\_\_ (sub 276, p. 3).

**C. ARGUMENT**

1. THE TRIAL COURT'S CONSIDERATION OF UNCONFRONTED HEARSAY AT THE SENTENCE MODIFICATION HEARING DOES NOT ENTITLE McCLINTON TO RELIEF IN THIS CASE.

McClinton contends that the trial court violated his due process right to confrontation when it considered hearsay evidence at his sentence modification hearing from declarants who did not testify. This Court should decline to review McClinton's claim both because it is moot and because McClinton waived his limited

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<sup>4</sup> By August 11, 2015, McClinton had absconded again. Supp. CP \_\_\_ (sub 276, p. 4).

confrontation right through his failure to object and his own use of hearsay.

- a. This Court Should Not Review McClinton's Claim Because It Is Moot And Does Not Involve Matters Of Continuing And Substantial Public Interest.

A claim is moot if a court can no longer provide effective relief. In re Pers. Restraint of Mattson, 166 Wn.2d 730, 736, 214 P.3d 141 (2009). An appellate court may nevertheless choose to decide a moot claim if it involves "matters of continuing and substantial public interest." Id. (quoting Sorenson v. City of Bellingham, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)). In assessing whether the requisite public interest is involved, the courts consider (1) "the public or private nature of the question presented," (2) "the desirability of an authoritative determination" to guide public officers in the future, and (3) the likelihood that the question will recur. Id.

McClinton's claim is moot because he has already served the entire sanction imposed by the trial court, and thus this Court cannot provide effective relief. Supp. CP \_\_\_ (sub 276, p. 3). McClinton appears to implicitly acknowledge that fact, as he has failed to identify any specific relief that he seeks from this Court.

Brief of Appellant at 19. Furthermore, because the law is clear that a defendant's timely assertion of his due process right to confrontation requires that the trial court not consider hearsay unless the declarant testifies or there is good cause for not allowing confrontation, there is no need for an additional authoritative determination to guide public officers in the future. See State v. Abd-Rahmaan, 154 Wn.2d 280, 290, 111 P.3d 1157 (2005). The question is also unlikely to recur so long as McClinton raises the issue in the trial court in the future. Therefore, this Court should not address McClinton's claim.

b. McClinton Waived His Due Process Right To Confrontation.

The Confrontation Clause does not apply in a sentence modification hearing. Abd-Rahmaan, 154 Wn.2d at 287-88. However, in order to ensure that a sentence modification is based on verified facts and accurate information, a defendant has a limited due process right to confront and cross-examine adverse witnesses at a sentence modification hearing unless the court finds good cause for not allowing confrontation. Id. at 286 (citing Morrissey v. Brewer, 408 U.S. 471, 489, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)). An analysis of good cause looks at the difficulty

and expense of procuring witnesses in combination with the reliability of the hearsay evidence. Id. at 290.

RAP 2.5 notwithstanding, a defendant who fails to object to a violation of his due process right to confrontation and himself uses hearsay during argument has waived the right, and may not later raise a due process challenge to the lack of confrontation for the first time on appeal. State v. Dahl, 139 Wn.2d 678, 687, 990 P.2d 396 (1999); State v. Nelson, 103 Wn.2d 760, 766, 697 P.2d 579 (1985). Here, McClinton failed to object to any of Chinn's testimony on the basis of his due process right to confrontation (or any constitutional right at all) at any point during the trial court proceedings, and he made use of hearsay he elicited from Chinn in arguing that his failure to reside at an approved residence was not willful.<sup>5</sup> 2RP 10, 13; 3RP 5-9.

Thus, even if this Court were to decide that McClinton's claim involves a matter "of continuing and substantial public interest," he has waived any claim to relief. Dahl, 139 Wn.2d at

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<sup>5</sup> Contrary to McClinton's assertions in his brief, there is no indication that a contemporaneous objection on due process grounds to either the hearsay from the sex offender registration office or the hearsay from McClinton's mother would have been a useless endeavor. See Brief of Appellant at 17. Not only did McClinton's failure to object to hearsay from the sex offender registration office precede the later overruled objection to hearsay from the mother, but there is no suggestion in the record that the later objection would have been overruled had it been made on the grounds of McClinton's due process right to confrontation, as that issue was never brought to the trial court's attention. 2RP 10, 13.

687; Trueax v. Ernst Home Ctr., Inc., 124 Wn.2d 334, 339, 878

P.2d 1208 (1994) (objection in trial court on different grounds than those argued on appeal is not sufficient to preserve alleged error).

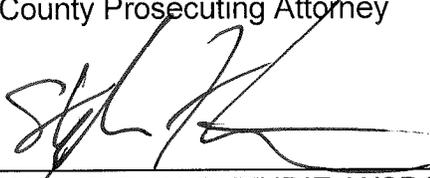
**D. CONCLUSION**

For all of the foregoing reasons, the State respectfully asks this Court to affirm the trial court's March 3, 2015, order sanctioning McClinton for violations of his conditions of community custody.

DATED this 14<sup>th</sup> day of October, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

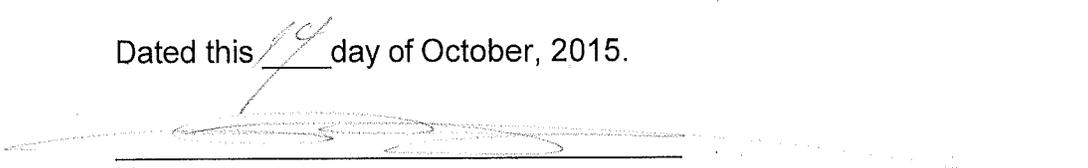
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Dana Nelson, the attorney for the appellant, at Nelsond@nwattorney.net, containing a copy of the BRIEF OF RESPONDENT in State v. Sallyea McClinton, Cause No. 73301-0, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 19 day of October, 2015.

  
Name:  
Done in Seattle, Washington