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COURT APPEALS

OCT 26 PM 2:02

NO. 34671-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

S.A.C.

Appellant.

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

The Honorable Sally F. Olsen, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Counsel's failure to ensure that appellant's due process rights were protected at the revocation hearing denied appellant effective representation.

Issue pertaining to assignment of error

Appellant's probation officer moved to revoke his deferred disposition based on an allegation of school misconduct. At the revocation hearing, the issue was whether the misconduct occurred before or after a previous hearing where the court declined to revoke for a similar violation. The state presented only second-hand information as to the timing issue, and defense counsel failed to object. Where counsel failed to protect appellant's right to due process, was appellant denied effective assistance of counsel?

B. STATEMENT OF THE CASE

On March 24 2005, the Kitsap County Prosecuting Attorney charged appellant S.A.C. with one count of harassment. CP 1; RCW 9A.46.020(1). The Honorable Theodore Spearman ordered a deferred disposition on April 25, 2005, requiring S.A.C. to complete 12 months of supervision, 16 hours of community service work, and one day of detention. CP 15. In addition, S.A.C. was required to attend school and obey all school rules while on supervision. CP 16.

On December 12, 2005, Carrie Prater, S.A.C.'s probation officer, filed a motion to revoke the deferred disposition, alleging that S.A.C. had received several referrals from school for disruptive and disrespectful behavior. CP 19-20. S.A.C. admitted the allegation and, following a hearing on January 24, 2006, the Honorable Sally F. Olsen found the violation to be de minimus and denied the motion to revoke. 1RP¹ 2. The court ordered an additional 16 hours of community service work. CP 21.

Prater filed a second motion to revoke on January 27, 2006, alleging that S.A.C. had had several unexcused absences from school and that he had failed to follow school rules, receiving referrals for misconduct. CP 22-23. At a hearing before the Honorable Leonard W. Costello on February 21, 2006, the parties agreed that the first allegation would be dismissed and S.A.C. would admit the second allegation. 1RP 2.

Prater explained that S.A.C. had received a disciplinary referral for attempting to trip a paraeducator. When the court asked whether the incident occurred before or after the previous hearing, Prater said it occurred after. She recommended that the court revoke S.A.C.'s deferred disposition. 1RP 3.

S.A.C.'s attorney asked the court to exercise its discretion and not revoke the deferred disposition. She informed the court that S.A.C. is on

¹ The Verbatim Report of Proceedings is contained in two volumes, designated as follows: 1RP—2/21/06; 2RP—3/7/06.

an IEP. He had changed schools since the incident and was doing well at the new school. 1RP 3. Counsel argued that S.A.C. was just two months from completion of the deferral period and had done fairly well up until that point. She asked the court to deny the motion to revoke. 1RP 4.

The court was concerned that the incident apparently occurred so soon after the previous revocation hearing in which the court decided not to revoke. It told S.A.C. he could not be in court on a motion to revoke in mid-January and then commit a new violation “before the ink is essentially dry” and not have a consequence. 1RP 4. The court granted the motion to revoke. 1RP 4.

Counsel then informed the court that there was a discrepancy as to when the attempted tripping incident occurred. While Prater believed it occurred on January 26, S.A.C. believed it happened prior to the January 24 revocation hearing. 1RP 5. The court permitted S.A.C. to withdraw his admission to the allegation and permitted the state to withdraw the recommendation that the first allegation be dismissed. 1RP 6.

The case proceeded to a fact finding hearing before Judge Olsen on March 7, 2006. At the hearing, both parties introduced evidence as to the alleged unexcused absences, and the court found that that allegation had not been proven. 2RP 7, 16, 25-28, 39.

As to the alleged attempted tripping, the state introduced a copy of the written referral form. On the form, the referring staff member, Tristan Benson, indicated that S.A.C. had attempted to trip him. 2RP 8. The date on the form was January 27, 2006. The form did not specify whether that was the date of the incident or the date the form was completed, however. 2RP 11. Prater testified that she believed referral forms are typically filled out the same day as the incident being reported, but she admitted that was not necessarily the case. 2RP 11.

The state did not call Benson as a witness. Instead, Prater testified that she had talked to Benson after the February 21 hearing, and he told her that the incident happened on the day he wrote the referral. 2RP 9. Carla Polillo, a school counselor, also testified that when Benson came to her office to fill out the referral form, S.A.C. was with him, and Benson said the incident had just occurred. 2RP 12.

Counsel did not object to the state's failure to call Benson as a witness or request an opportunity to cross examine him. The state gave no indication as to why he was not called, and court made no finding that the statements attributed to him were clearly reliable.

Nancy Cole, S.A.C.'s mother, testified that she received a call from the vice principal regarding the attempted tripping incident on January 27. She understood, based on that conversation, that the incident

had occurred earlier in the week. 2RP 29. S.A.C. admitted that he attempted to trip Benson and that he knew that was not appropriate behavior. 2RP 35.

At the close of evidence, the state asked the court to revoke S.A.C.'s deferred disposition. 2RP 37. S.A.C.'s attorney argued that the attempted tripping was a fairly minor incident near the end of an otherwise well-performed deferred disposition and again asked the court to exercise its discretion not to revoke. 2RP 39.

The court responded that it did not revoke for the last violation, and three days later Prater had filed another motion to revoke. 2RP 38. The court specifically found that the incident occurred on the date of the referral, as corroborated by the counselor. 2RP 39. The court stated it was very concerned that three days after it signed the previous order, there was additional misconduct. The court declined to find the violation de minimus, and it revoked the deferred disposition. 2RP 39; CP 24-30.

S.A.C. filed this timely appeal. CP 33.

C. ARGUMENT

COUNSEL'S FAILURE TO ENSURE THAT S.A.C.'S DUE PROCESS RIGHTS WERE PROTECTED DENIED S.A.C. EFFECTIVE ASSISTANCE OF COUNSEL.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend, VI; Wash. Const. art. 1, §

22. A defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993). Both requirements are met here. No reasonable attorney would have failed to protect her client's due process rights, and S.A.C. has suffered prejudice as a result of his attorney's conduct in this case.

An offender facing revocation of his deferred sentence is entitled to some degree of due process. Gagnon v. Scarpelli, 411 U.S. 778, 782, 36 L. Ed. 2d 656, 93 S. Ct. 1756 (1973); Morrissey v. Brewer, 408 U.S. 471, 488-89, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972); State v. Nelson, 103 Wn.2d 760, 762-63, 697 P.2d 579 (1985). These fundamental procedural protections apply in juvenile disposition proceedings as well. See e.g. State v. S.S., 67 Wn. App. 800, 807, 840 P.2d 891 (1992); RCW 13.40.200 (at hearing on violation of disposition order, juvenile entitled to the same due process as would be afforded adult probationer).

The minimal due process requirements include "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)[.]" Gagnon,

411 U.S. at 786 (quoting Morrissey, 408 U.S. at 489). Accordingly, statements which would be inadmissible hearsay at trial may be admitted at a revocation hearing², but only where there is good cause to deny the right of confrontation. State v. Anderson, 88 Wn. App. 541, 544, 945 P.2d 1147 (1997). “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.” Nelson, 103 Wn.2d at 765.

When a probationer objects to the denial of his right to confront and cross-examine an adverse witness, the state must show that the witness’s presence could not reasonably be procured and that the hearsay presented is reliable. The court must specifically find good cause to justify denying the probationer’s right of confrontation. See Gagnon, 411 U.S. at 786; Nelson, 103 Wn.2d at 765; Anderson, 88 Wn. App. at 544-54. But if the probationer fails to object to procedures used by the state in presenting evidence at the revocation hearing, he waives any right of confrontation and cross examination. Nelson, 103 Wn.2d at 766.

In Nelson, the state sought to revoke the defendant’s suspended sentence. The state called no witnesses at the revocation hearing, instead relying on written reports from staff at Western State Hospital. Nelson, 103 Wn.2d at 762. Nelson did not object to the use of the reports or the

² ER 1101(c)(3) exempts juvenile disposition hearings from the rules of evidence.

failure to introduce them into evidence. Id. When Nelson argued for the first time on appeal that the court's reliance on written hearsay reports denied him due process, the Supreme Court found he had waived any due process objection. Id. at 766. The court held that if a probationer believes live testimony is necessary at a revocation hearing, he can move for a pretrial order or challenge the state's evidence with a timely objection. "Such suggested procedures guarantee the probationer's due process right." Id. The probationer may not sit by without objection but rather must bear some responsibility for the orderly administration of the process. Id.

Here, counsel did not object to testimony about Benson's out of court statements regarding when the attempted tripping occurred. As a result, the state was not required to show that it would be too difficult or expensive to call Benson as a witness, and the court never considered whether his statements were clearly reliable. Since the only issue in dispute as to this violation was the timing of the incident, the statements attributed to Benson were crucial. It was counsel's responsibility to ensure that the court consider this hearsay only on a showing of good cause. By objecting, counsel would have guaranteed S.A.C.'s due process right. See Nelson, 103 Wn.2d at 766; State v. Robinson, 120 Wn. App. 294, 300, 85 P.3d 376 (probationer must object to use of hearsay to

preserve due process right), review denied, 152 Wn.2d 1031 (2004). Counsel's failure to ensure that S.A.C. received due process constitutes deficient performance.

As a result S.A.C. was prejudiced, because there is a reasonable probability that but for counsel's error, the result of the proceedings would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (quoting Strickland, 466 U.S. at 693-94).

The hearsay evidence presented by the state went to the sole issue in dispute as to this allegation, whether the incident occurred before or after the previous revocation hearing. Even though S.A.C. admitted the conduct on which the allegation was based, the court had discretion to treat the violation as de minimus and deny the motion to revoke the deferred disposition. See State v. Lown, 116 Wn. App. 402, 409, 66 P.3d 660, review denied, 150 Wn.2d 1024 (2003), overruled on other grounds in State v. Ramer, 151 Wn.2d 106, 86 P.3d 132 (2004); RCW 13.40.127(7). Judge Olsen made it clear, as did Judge Costello, that the timing of the incident was key in determining whether to consider the violation de minimus. 1RP 4; 2RP 39. Because she found, based on the hearsay presented, that the incident occurred just after the previous hearing at which she had declined to revoke, Judge Olsen felt it would be

inappropriate to exercise her discretion in S.A.C.'s favor again. 2RP 38-39.

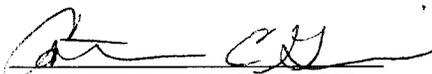
In order to ensure due process, a hearing must be “structured to assure that the finding of a violation will be based on verified facts and that the exercise of discretion will be informed by accurate knowledge of the [probationer’s] behavior.” Morrissey, 408 U.S. at 484. Because counsel failed to protect S.A.C.’s right to confront and cross-examine the witness as to this crucial issue, there is no assurance that the court’s discretion was informed by accurate knowledge of S.A.C.’s behavior. Counsel’s prejudicial error denied S.A.C. effective assistance of counsel.

D. CONCLUSION

S.A.C. was denied effective assistance of counsel at the revocation hearing, and this court should reinstate his deferred disposition.

DATED this 18th day of October, 2006.

Respectfully submitted,



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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid,
properly stamped and addressed envelopes containing copies of the Brief of Appellant in
State v. Stephen A. Cole, Cause No. 34671-1-II, directed to:

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



Catherine E. Glinski
Done in Port Orchard, WA
October 19, 2006

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