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COURT OF APPEALS

NO. 34803-9

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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JESS JAMES VARNELL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable D. Gary Steiner, Judge

No. 04-1-00634-3

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. When the court terminates a defendant from the drug court program based upon his request to terminate the program, and after his attorney waives his rights to a termination hearing, are the defendant's due process rights violated?

2. At the April 12, 2006, status hearing, was the defense attorney acting in his scope of authority when he represented the defendant's desire to terminate from the drug court program?

B. STATEMENT OF THE CASE.

1. Procedure

On February 11, 2004, the defendant was charged with unlawful possession of a controlled substance and driving while in suspended or revoked status in the third degree. CP 3-5. On March 18, 2004, the defendant entered the Pierce County Drug Court Program on the above noted charges. CP6-7, CP 12-14, CP 96-98 (Notice to Defendant). The defendant appeared for a period of time for monthly review hearings in drug court. Order of Conditions and Notice of Status Hearing Date. CP 99-107.

On or about January 10, 2005, the defendant failed to appear for a drug court hearing and a bench warrant was issued. CP 15 16. The

defendant was arrested on the warrant on or about January 26, 2005. CP 108. The defendant was released from confinement on July 11, 2005. CP 109-110. The defendant signed an order requiring him to report to "PCA" (Pierce County Alliance) upon release. CP 111. The Order of Conditions and Notice of Status Hearing Date also set a termination hearing for the same day as his next drug court review hearing, August 4, 2005. CP 111. The defendant failed to appear for the August 4, 2005, termination hearing and a bench warrant was issued. CP 36 -37. On or about March 15, 2006, the defendant was arrested on the warrant. CP 112. The defendant was seen in court on the warrant on March 16, 2006. CP 113. A review hearing was set for April 12, 2006. CP 114.

At the April 12, 2006, review hearing, the defendant appeared in custody with counsel. RP 1-6. The State advised the court the defendant was in custody due to the drug court warrant and a District Court warrant. RP 2. The State noted the length of time the defendant was in the program, and that the defendant had new charges and requested he be held pending a termination hearing. RP 2. A second termination hearing was requested for May 9, 2006. RP 3.

Defense counsel advised the court the defendant wished to address the court. RP 3. The court gave the defendant the opportunity to speak. RP 3. The defendant began by telling the court: "I have been in Drug Court for quite some time. I wanted to – I want out of the program." RP 3. The State advised the court that the State heard the

defendant say he wanted out of the program. RP 4. The defense counsel inquired as to the standard range, and learned that it was 18 months, and credit for time served was later determined to be 245 days. RP 4-6. The defense attorney advised the court that his client, “.. would like to do it today, Your Honor. He would stipulate and otherwise waive any rights that he might have to a termination hearing in order to accomplish that. He’s looking at 18 months.” RP 4.

After defense counsel’s representation, the court signed an Order of Termination. CP 54-55. The court then read the police reports and made a finding of guilt. CP 115-117 (Findings of Fact Conclusions of Law) RP 5. The parties moved to sentencing. Prior to imposition of sentence, the court afforded the defendant another opportunity to address the court. RP 6. The defendant told the court, “You guys saved my life. I want to go home to my family in Los Angeles.” The court imposed sentence. RP6 CP 57-72. A notice of appeal was filed May 11, 2006. CP 73-86.

2. Facts

On February 10, 2004, the defendant was driving a vehicle police stopped because the registered owner of the vehicle had a suspended license. Defendant Varnell matched the description of the registered owner. CP 5. A records check revealed the defendant’s driving status was suspended. CP 5. The defendant was arrested and a search incident to

arrest revealed a pouch with drug paraphernalia and a white powder that field tested for methamphetamine. CP 5. The defendant admitted that the items were his, and that he had a drug problem. CP 5.

C. ARGUMENT.

1. THE COURT DID NOT VIOLATE THE DEFENDANT'S DUE PROCESS RIGHTS WHERE THE DEFENDANT REPRESENTED BY COUNSEL STIPULATED TO TERMINATION AND WAIVED HIS RIGHTS.

RCW 2.28.170 authorizes counties to establish a drug court, but contains no provisions for the operation of the program. In State v. Cassill -Skilton, 122 Wn. App 652, 94 P.3d 407 (2004), the court held that in a drug court termination hearing, the trial courts function is similar to evaluating alleged probation violations. The court in Cassill-Skilton looked to RCW 10.05.010 et. seq. for guidance, and also looked to the case of State v. Marino, 100 Wn.2d 719, 674 P.2d 171 (1984) as controlling.

In Marino the court scrutinized the due process standards under RCW 10.05.010 et. seq. in a deferred prosecution. The provisions of RCW 10.05.090 required the court to conduct a hearing after notice of the hearing and notice to the defendant regarding basis upon which the State was seeking termination. The court then held that a defendant must also

have the opportunity to be heard and present evidence. Marino, at 723, (citing State v. Lawrence, 28 Wn. App 435, 624 P.2d 201 (1981)).

Courts have applied similar minimal due process standards to other forms of hearings. For example, in a SOSSA revocation hearing, an offender has only minimal due process rights. State v. Dahl, 139 Wn.2d 678, 990 P.2d 396 (1999) (citing State v. Nelson, 103 Wn.2d 760, 763, 697 P.2d 579 (1985)). “Sexual offenders who face SSOSA revocation are entitled the same minimal due process rights as those afforded during the revocation of probation or parole.” State v. Badger, 64 Wn. App 904, 908-909, 827 P.2d 318 (1992). Due process in a sentence modification hearing is satisfied if the defendant had notice of the hearing, had reasonably been informed of the alleged violations, and had an opportunity to be heard and present evidence. See, City of Seattle v. Lea, 56 Wn. App. 859, 860-61, 786 P.2d 798 (1990).

A review of the record demonstrates the defendant’s minimal due process rights were satisfied. He twice had notice the State was seeking termination. CP 111 and RP 2. Mr. Varnell was advised by the State that the basis was that he had been in the program for two years, the new charges, and that Mr. Varnell had been on warrant status for the last six months. RP 2. The defendant requested and was afforded the opportunity to speak telling the court immediately, “...I wanted to – I want out of the

program.” RP 3-4. Mr. Varnell clearly had notice, was advised of the States reasons for termination and had an opportunity to be heard by the court.

This court must consider also that the termination from the drug court termination that occurred April 12, 2006, was at the defendant’s request. At the hearing, the defendant told the court “.. I wanted to- I want out of the program.” RP 3-4. Even after Mr. Varnell received notice and was given the opportunity to speak, he apprised the court through counsel that he wanted to waive any rights to a hearing and proceed. Mr. Varnell’s counsel stated:

“He would like to do it today, Your Honor. He would *stipulate and otherwise waive any rights that he might have to a termination hearing in order to accomplish that.* He’s looking at 18 months.”

RP 4.

The defense counsel acted based upon the unequivocal request of Mr. Varnell who stated he wanted out of the program. The on the record stipulation was the legal affirmation of the defendant’s desire to terminate the program. There is nothing on the record suggesting the defendant did not knowingly, and voluntarily, tell the court that he wanted to exit the program when he stated, “I wanted to-- I want out of the program.”

Mr. Varnell asserts that there was insufficient proof that he knowingly, voluntarily, and intelligently waived his rights to a termination

hearing. A defendant may waive fundamental constitutional rights provided the waiver is knowingly, voluntarily, and intelligently made. State v. Thomas, 128 Wn.2d 553, 910 P.2d 475 (1996). In Thomas, the court held that the trial court was not obligated to obtain an on the record waiver of the right to self-representation when a defendant appeared with counsel. Similarly here, there was no requirement to conduct an on the record colloquy when counsel waived the rights to a hearing on behalf of the defendant.

Procedural and constitutional rights are treated differently. State v. Conlin, 49 Wn. App 593, 744 P.2d 1094 (1987) (citing State v. Smith, 104 Wn.2d 497, 508, 707 P.2d 1306 (1985)). In Conlin, the defendant received a deferred sentence, and one year later the court revoked the deferred sentence because the defendant had violated the conditions of the sentence. At the hearing to revoke, the defendant indicated that he did not want an attorney and explained his reasons for his violations. The court revoked the probation and the defendant appealed arguing he did not effectively waive his right to counsel. The court held that the defendant had a procedural and not a constitutional right to counsel. There was no need to apply the constitutional standard that requires knowing, voluntary, and intelligent waiver of the right to counsel where a procedural right is involved. Instead, a knowing and voluntary and not an intelligent waiver of the procedural right is sufficient. Even a waiver of constitutional rights that does not require utmost zealously and protection is only measured

by a “knowing and voluntary” standard. Conlin, at 595 (citing State v. Robtoy, 98 Wn.2d 30, 37 n.1 653 P.2d 284 (1982)).

At the April 12, 2006, hearing, Mr. Varnell had been in the drug court program for two years with the last six months on warrant status. At the hearing while represented by counsel, Mr. Varnell unequivocally knowingly, and voluntarily told the court he wanted “out of the program.” His statements to the court initiated the inquiry by defense as to the standard range and the stipulation so the process of termination could occur immediately:

“He would like to do it today, Your Honor. He would stipulate and otherwise waive any rights that he might have to a termination hearing in order to accomplish that. He’s looking at 18 month.”

RP 4.

When the discussion on the record concerned credit for time served the defendant made no mention, objection or statement regarding the length of incarceration that may be imposed. When the defendant was afforded the right of allocution, he made comments that could be characterized as words of gratitude. RP 6. Never at any point did Mr. Varnell advise the court he wished to remain in the drug court program. Never did he express a statement that was inconsistent with his desire to get “out of the program.” Mr. Varnell’s actions and statements, and those of his attorney, demonstrate the defendant’s stipulation to termination was

knowingly and voluntarily made. The court acted accordingly and without violation of the defendant's due process rights when he was terminated and sentenced from the drug court program. April 12, 2006.

2. DEFENSE COUNSEL WAS ACTING IN THE SCOPE OF HIS AUTHORITY WHEN HE REPRESENTED HIS CLIENT AT THE APRIL 6, 2006, HEARING.

“An attorney is impliedly authorized to stipulate to and to waive procedural matters such as those obviating the need for certain proof.” State v. Fanger, 34 Wn. App. 635, 637, 663 P.2d 120 (1983) (citing State v. Dault, 19 Wn. App 709, 716, 578 P.2d 43 (1978)). A defense attorney has the authority to waive a procedural CrR 3.5 hearing on his client's behalf. State v. Fanger, 34 Wn. App 635, 663 P.2d 120 (1983). An attorney may waive a procedural (as opposed to substantive) right for tactical purposes. State v. Finch, 137 Wn.2d 792, 806, 975 P.2d 967 (1999).

In Mr. Varnell's case, the defense attorney was acting within the scope of his authority. To waive a termination hearing where his client wishes to terminate from the program is similar to the situation where a defense attorney, like in Fanger, waived the need for a procedural CrR 3.5 hearing. To set a hearing would not have been consistent with Mr. Varnell's wishes to proceed immediately. He had unequivocally stated he

wanted out of the program. The defense attorney was clearly acting in the scope of his authority when he put the stipulation to terminate on the record, and waived his client's rights in order to facilitate the termination. There is no need to have an on the record colloquy that the defense counsel was authorized to waive client rights. See, Fanger, supra at 637 (rejecting defendant's argument that there was not a valid CrR 3.5 waiver where there was no record of defendant consulting with his attorney on this).

D. CONCLUSION.

A defendant's due process rights are not violated when represented by counsel he requests termination and legally stipulates to termination. It is also within the attorney's authority to waive the necessary minimal due process rights in order to facilitate his client's request.

DATED: October 30, 2006.

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BY dn
DEPUTY

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

Selk

 Theresa Kal
Date Signature