

NO. 38625-9-II

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

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY THOMAS MALM, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stephanie A. Arend

No. 04-1-03255-7

Brief of Respondent

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

1. In a SSOSA revocation hearing, was the defendant's fourteenth amendment due process rights waived where he did not object to hearsay evidence considered by the court?
2. Did the trial court abuse its discretion in revoking defendant's SSOSA sentence where the court based its decision on the evidence before the court?

B. STATEMENT OF THE CASE.

1. Procedure

On July 1, 2004, the State charged Anthony Thomas Malm, (hereinafter referred to as the defendant), with two counts of child molestation in the second degree. CP 1-4. On September 30, 2004, the defendant pleaded guilty as charged. CP 5-16. The court sentenced him on December 10, 2004, under the Special Sex Offender Sentencing Alternative (SSOSA), as agreed upon by the parties, to 3-4 years of community custody, at least three years of successful sex offender treatment, and a 41 month suspended sentence. CP 19-32.

Responding to concerns over the length of court jurisdiction, defense counsel submitted a brief to the court about the issue in January of 2008. CP 145-186. The court and both parties agreed the court had

jurisdiction over the defendant for the length of community custody, until December 10, 2008. *Id.*, RP 1/25/08, 3. On September 24, 2008, the defendant was arrested for violating the terms of his suspended sentence. CP 125-133.

On November 14, 2008, after considering recommendations from the defendant's community corrections officer (CCO), the defendant's treatment provider, and the State, the court revoked the defendant's suspended sentence and ordered the defendant to serve the 41 months in prison. CP 117-119, CP 120-124, CP 125-133, RP 11/14/08, 22. On November 25, 2008, the defendant filed this timely notice of appeal. CP 134-137.

2. Facts

On December 10, 2004, the court ordered the defendant to successfully complete at least three years of sex offender treatment through the SSOSA program, supervised by Macy's and Associates. RP 12/10/04, 10-13. The defendant appeared to make progress in the program until July of 2007. CP 37-38; CP 39-40; CP 41-42; CP 43-44; CP 45-46; CP 47-48; CP 49-51; CP 52-53; CP 63-66. In a letter to the court, dated July 25, 2007, Dr. Robert Macy reported the defendant was "in pattern," but amenable to treatment. CP 83-85. A defendant in pattern exhibits thinking and behavior similar to those engaged in while offending. *Id.* At a review hearing on July 27, 2007, the prosecutor and the defendant's CCO expressed concerns that after two and a half years of treatment, the

defendant showed little progress. RP 7/27/07, 4. Additionally, the prosecutor expressed his intent to seek revocation of the defendant's suspended sentence at a future hearing if improvements did not occur. *Id.*

Dr. Macy appeared before the court at the September 14, 2007, revocation hearing. At this hearing, the prosecutor and defense counsel questioned Dr. Macy. RP 9/14/07, 6-14. Dr. Macy testified that in three years of treatment, the defendant's efforts were inconsistent, with roughly two-thirds of the time not spent at the expected participation level. RP 9/14/07, 10, 13. Even with completion of the court imposed treatment, Dr. Macy stated the defendant would need post treatment to ensure his safe presence in the community. *Id.* at 12. Dr. Macy expressed concerns over the defendant's continued sexual arousal to minors, but believed the defendant could still benefit from continued treatment. *Id.* at 13-14. The court set a new review hearing, holding decision on the revocation in abeyance until December 14, 2007. *Id.* at 19.

On December 14, 2007, the court expressed concerns about its continued jurisdiction over the defendant's case. The court once again continued the revocation hearing, pending briefing on the court's jurisdiction to move forward. The parties appeared in court on January 25, 2008, and agreed the court's jurisdiction lasted through December 10, 2008. CP 145-186, RP 1/25/08, 3. The court set a revocation hearing for March 28, 2008, and ordered Dr. Macy to appear. RP 1/25/08, 4.

At the March 28, 2008, revocation hearing, Dr. Macy testified the defendant showed significant progress in treatment and could potentially complete treatment by May of 2008. RP 3/28/08, 5-7. Additionally, the defendant's CCO submitted a report to the court stating the defendant was in compliance with his supervision terms. CP 105-107. The court and prosecutor agreed that prior concerns with the defendant's progress had been rectified. RP 3/28/08, 5-8. The court set a review hearing for October 10, 2008, to potentially release the defendant from the suspended sentence conditions. *Id.* at 7.

A progress report to the court, filed May 29, 2008, indicated the defendant continued to show signs of arousal to female children. CP 108-110. A progress report to the court, filed September 2, 2008, indicated defendant showed signs of "significant sexual arousal to female children," and "sexual dreams about minors." CP 111-113. Later in September, the defendant disclosed to Dr. Macy and the defendant's CCO that he intentionally interacted with two minors while at work. CP 111-113, CP 120-124. Dr. Macy reported to the court and the defendant's CCO, his belief that the defendant's "deviant sexual arousal, suicidal ideations, depression and disingenuous reporting," made the defendant a risk to children in the community. CP 111-113. Dr. Macy found the defendant's disingenuous reporting particularly egregious given the defendant had been in treatment for more than three and a half years. *Id.* Based on these reports from Dr. Macy, the defendant's CCO made the decision to arrest

the defendant. CP 120-124. Officials took the defendant into custody on September 24, 2008, when the defendant reported for a polygraph test. *Id.*

The court held a revocation hearing on November 14, 2008. RP 11/14/08, 3-23. Jason Fiman, the defendant's CCO, appeared before the court in support of revoking the defendant's SSOSA. *Id.* at 17-18. Mr. Fiman referenced Dr. Macy's report to the court, citing several concerns over the defendant's continued presence in the community. *Id.* at 17, CP 111-113. Based on the defendant's unsatisfactory progress in treatment, the State asked the court to revoke the defendant's suspended sentence. RP 11/14/08, 18. Referencing Dr. Macy's previous appearances, reports to the court, and the CCO's concerns, the court found that the defendant had not benefited from treatment and his release into society would be a risk to young children. *Id.* at 15, 19-22. Accordingly, the court revoked defendant's suspended sentence. *Id.* at 22, CP 117-119.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT DENY THE DEFENDANT HIS DUE PROCESS RIGHTS WHEN THE COURT CONSIDERED HEARSAY EVIDENCE AND MADE ORAL FINDINGS OF FACT AND CONCLUSIONS OF LAW.

A trial court may impose a SSOSA sentence, which suspends the sentence for a first time sex offender, if the offender is proven to be amenable to treatment. RCW 9.94A.670(4); *State v. Dahl*, 139 Wn.2d

678, 682, 990 P.2d 396 (1999). The court may revoke a SSOSA at any time if it is reasonably satisfied that an offender has violated a condition of his sentence or has failed to make progress in treatment. RCW 9.94A.670(10); *State v. Canfield*, 120 Wn. App. 729, 732, 86 P.3d 806 (2004); *State v. Kuhn*, 81 Wn.2d 648, 503 P.2d 1061 (1972). Revocation hearings are not criminal proceedings, and the offender is not afforded the same due process rights as those afforded at trial. *Dahl*, 139 Wn.2d at 683; *State v. McCormick*, 141 Wn. App. 256, 260-261, 169 P.3d 508 (2007). The Washington Supreme Court noted:

The United States Supreme Court has determined that, in the context of parole violations, minimal due process entails: (a) written notice of the claimed violations; (b) disclosure to the parolee of the evidence against him; (c) the opportunity to be heard; (d) the right to confront and cross-examine witnesses (unless there is good cause for not allowing confrontation); (e) a neutral and detached hearing body; and (f) a statement by the court as to the evidence relied upon and the reasons for revocation. *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972). These requirements exist to ensure that the finding of a violation of a term of a suspended sentence will be based upon verified facts. *Id.* at 484.

Dahl, 139 Wn.2d at 683.

- a. In considering hearsay evidence, the trial court did not deny the defendant his due process right to confront witnesses.

On September 25, 2008, the State filed a petition to revoke with the court, giving the defendant notice of the State's intention to seek revocation based on the defendant's failure to stay in compliance with sex

offender treatment. CP 189-192. On November 14, 2008, CCO Fiman filed with the court a notice of violation, detailing CCO Fiman's investigation and conclusions. CP 125-133. The notice of violation also contained a letter to CCO Fiman from Dr. Macy, discussing the defendant's lack of progress in sex offender treatment and the defendant's danger to the community, and a polygraph report. *Id.* CCO Fiman appeared before the court at the November 14, 2008, revocation hearing and discussed his concerns, and the concerns expressed by Dr. Macy in his letter to CCO Fiman. RP 11/14/08, 17-18; CP 120-124. The court also considered Dr. Macy's progress reports to the court, filed September 2, 2008, and May 29, 2008, which reported significant continued arousal to minors and continued sexual dreams about minors. RP 11/14/08, 21; CP 111-113, CP 108-110.

Defense counsel did not object to the court considering the CCO's testimony or the reports submitted by Dr. Macy. Instead, defense counsel, and the defendant, referred to Dr. Macy's reports for their own benefit to argue the defendant was successfully complying with treatment requirements. RP 11/14/08, 14, 19-20. These facts are important for two reasons: first, because the defendant did not object below, he may not claim on appeal that the court denied him his due process right to confront witnesses when the court considered hearsay. *See State v. Dahl*, 139

Wn.2d at 687, n.2. Secondly, the defendant's own reliance on hearsay during argument constitutes a waiver of any right of confrontation and cross-examination regarding that issue. *Id.*, quoting *State v. Nelson*, 103 Wn.2d 760, 766, 697 P.2d 579 (1985)). Therefore, the court did not deprive the defendant his due process right to confront witnesses at the revocation hearing.

b. The trial court did not deny defendant his due process right to findings of fact and conclusions of law.

As due process requires that judges articulate the factual basis of their decision, written findings are preferred but not required. *Nelson*, 103 Wn.2d at 767. Written findings facilitate appellate review, allowing the appellate court to ascertain the presence or absence of substantial evidence in support of the decision to revoke. *State v. Davenport*, 33 Wn. App. 704, 657 P.2d 794 (1983), *rev'd on other grounds*, 100 Wn.2d 757, 675 P.2d 1213 (1984). However, the lack of specific written findings is not fatal where the trial court states on the record the evidence it relies upon and states its reasons for revocation. *State v. Murray*, 28 Wn. App. 897, 627 P.2d 115 (1981). *State v. Myers*, 86 Wn.2d 419, 429, 545 P.2d 538 (1976), *see also Dahl*, 139 Wn.2d at 689.

In deciding to revoke the defendant's suspended sentence, the court stated:

The Court: I think what's troubling to me is that after all this time the reports continue to show arousal to minors, and [Dr. Macy's report] says "until he's not sexually aroused to minors, he should not be around any minor children." It is also concerned that he's having sexual dreams about minors... You know, so that's very disconcerting to me.

RP 11/14/08, 21. The trial judge continued by stating:

The Court: [Dr. Macy's report] filed May 29th, and it says his last physiological assessment for sexual arousal indicated that he is being aroused to both female adults and children. So that was in May. So it's you, it's persisted, and what we're supposed to see over time in treatment is that, you know-

The Defendant: Declining, yes.

The Court: Right...I would agree with [the prosecutor] that [the defendant] presents a very real risk. He has not benefited from treatment, and to release him into society, I think, is a risk for young children. So I'm going to revoke your SSOSA sentence.

Id. at 22. The court clearly relies on evidence from Dr. Macy's progress reports to the court and CCO Fiman's reports and testimony. Based on this evidence, the court articulates that the defendant's sexual arousal to minors, sexual dreams about minors, and lack of progress in treatment, makes the defendant a risk to society. The court then revoked the

defendant's SSOSA sentence. This clear expression of the court's findings of fact is sufficient to fulfill the due process rights guaranteed to the defendant.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REVOKING THE DEFENDANT'S SUSPENDED SENTENCE.

The court may revoke a SSOSA at any time if it is *reasonably satisfied* that an offender has violated a condition of his sentence or has failed to make progress in treatment. RCW 9.94A.670(10); *State v. Canfield*, 120 Wn. App. 729, 732, 86 P.3d 806 (2004); *State v. Kuhn*, 81 Wn.2d 648, 503 P.2d 1061 (1972). A finding that the violations were willful is not required. *McCormick*, 141 Wn. App. at 263.

An appellate court will not disturb the revocation of a suspended sentence absent an abuse of discretion. *State v. Badger*, 64 Wn. App. 904, 908, 827 P.2d 318 (1992). In order to obtain reversal of an order revoking a SSOSA sentence, defendant must show that the sentencing court's decision is "manifestly unreasonable or exercised on untenable grounds for untenable reasons." *State v. Hays*, 55 Wn. App. 13, 16, 776 P.2d 718 (1989). Sentencing courts have the discretion to sanction SSOSA violation as a probation violation or by revoking the SSOSA suspended sentence. *State v. Partee*, 141 Wn. App. 355, 362-63, 170 P.3d 60 (2007) (citing *State v. Badger*, 64 Wn. App. 904, 910, 827 P.2d 318 (1992)). A

court's decision to impose one particular sentencing option while erroneously believing other legally available options are unavailable may be an abuse of discretion. *Partee*, 141 Wn. App. at 361-62. In such a case, an appellate court may remand the case back to the sentencing court so the sentencing court can exercise its discretion in deciding whether to adhere to its previous revocation or impose other legally available options. *Id.* at 363.

The defendant contends that the court should have considered sanctions under the following sections of former RCW 9.94A.634:

(1) If an offender violates any condition or requirement of a sentence, the court may modify its order of judgment and sentence and impose further punishment in accordance with this section.

...

(3) If an offender fails to comply with any of the requirements or conditions of a sentence the following provisions apply:

...

(c) The State has the burden of showing noncompliance by a preponderance of evidence. If the court finds that the violation has occurred, it may order the offender to be confined for a period not to exceed 60 days for each violation, and may (i) convert a term of partial confinement to total confinement, (ii) convert community restitution obligation to total or partial confinement, (iii) convert monetary obligations, except restitution and the crime victim penalty assessment, to community restitution hours at the rate of the state minimum wage as established in RCW 49.46.020 for each hour of community restitution, or (iv) order one or more of the penalties authorized in (a)(i)

of this subsection. Any time served in confinement awaiting a hearing on noncompliance shall be credited against any confinement order by the court.

Appellant's Brief, 11-12.

Partee holds failure to consider other legally available options *may* be an abuse of discretion, but this does not apply a blanket standard to every case. *Partee*, 141 Wn. App. at 361-62. In the defendant's case, the court did not abuse its discretion in revoking the defendant's suspended sentence. The court stated the defendant had "not been a stellar SSOSA candidate," and indicated the court considered revoking the defendant's SSOSA in January of 2008. RP 11/14/08, 12. Despite the State's original petition to revoke the defendant's suspended sentence, the court gave the defendant an "opportunity to be treatment compliant." *Id.* at 14. The court further stated that the concerns which initially prompted the State to petition for SSOSA revocation in July of 2007, had yet to be resolved 16 months later. *Id.* at 15. At the November 14, 2008, revocation hearing, defense counsel suggested imposing new treatment options as opposed to revocation, to which the court responded, "I don't know that there's the time to present or consider any alternatives..." *Id.* at 19-20. This indicates the court felt immediate action, more severe than continued treatment, was needed to protect the community from the defendant. The court later reemphasized this point by stating:

The Court: So I don't think that, you know, alternative treatment options, that the court has really any time. It seems to me that the court has time to do one of two things, either release Mr. Malm from any further obligation or revoke his SSOSA and send him to prison. It seems to me those are my only two options given the time frame we're under and given that he apparently is still continuing to be aroused. I would agree with the prosecutor that he presents a very real risk. He has not benefited from treatment, and to release him into society, I think, is a risk for young children.

Id. at 22. The court's statements indicate a desire to keep the defendant out of the community.

After nearly four years of failed treatment, the court clearly felt frustrated and desired a long-term plan to get the defendant off the streets. A 60-day confinement period, as proposed by former RCW 9.94A.634(3)(c), does not satisfy the requirements the court wished to fulfill, however, revocation of the suspended sentence does. There is no evidence the court did not consider the 60-day confinement period.

However, even if it did not consider the 60-day confinement period, all the evidence suggests the court would have rejected the option given the defendant's situation. This therefore, does not amount to what may be considered an abuse of discretion under the *Partee* standard. Using proper discretion, the court chose to revoke the defendant's SSOSA sentence and get the defendant off the streets.

D. CONCLUSION.

For the reasons discussed above, the State respectfully asks this court to affirm the decision below.

DATED: September 21, 2009.

Mark Lindquist.
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Prosecuting Attorney

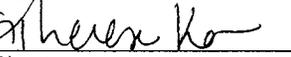


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Certificate of Service:

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.

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