

NO. 39136-8-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
CLERK OF COURT
JAN 11 2011
11:15 AM

STATE OF WASHINGTON,

Respondent

vs.

OSCAR J. CHURCHILL,

Appellant.

SUPPLEMENTAL BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

The Honorable Carol Murphy, Judge

Cause No. 06-1-00838-7

PATRICIA A. PETHICK, WSBA NO. 21324
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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The trial court erred in revoking Churchill's SSOSA.
2. The trial court erred in entering Findings of Fact and Conclusions of Law dated November 13, 2009, findings Nos. 4, 5, 6, 7, 8, 9, 10; and conclusions Nos. 2, 3. [Appendix "A"; State's Supp. CP 98-105].
3. The trial court erred in timely failing to enter written findings of fact and conclusions of law following the revocation of Churchill's SSOSA, which has prejudiced his right to appeal in that the State has tailored its response.

B. SUPPLEMENTAL ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in revoking Churchill's SSOSA? [Assignments of Error Nos. 1-3].
2. Whether the trial court erred in timely failing to enter written findings of fact and conclusions of law following the revocation of Churchill's SSOSA, which has prejudiced his right to appeal in that the State has tailored its response? [Assignments of Error Nos. 1-3].

C. STATEMENT OF THE CASE

For the purposes of this brief, DDC adopts and incorporates the statement of the case as set forth in his opening brief of appellant, the verbatim report of proceedings, the clerk's papers, and the supplemental clerk's papers filed herein as Appendix "A."

D. SUPPLEMENTAL ARGUMENT

- (1) THE COURT'S FAILURE TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER THE COURT REVOKED CHURCHILL'S SSOSA HAS PREJUDICED HIS RIGHTS ON APPEAL AS THE STATE HAS BEEN AFFORDED THE OPPORTUNITY TO TAILOR ITS RESPONSE.

State v. Abd-Rahmaan, 154 Wn.2d 280, 288, 111 P.3d 1157 (2005) and State v. Dahl 139 Wn.2d 678, 683, 990 P.2d 396 (1999) require the court to enter written findings upon the revocation of SSOSA in order to ensure that due process is satisfied. A trial court's oral ruling "has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment." State v. Bryant, 78 Wn. App. 805, 812, 901 P.2d 1046 (1995) (*quoting State v. Mallory*, 69 Wn.2d 532, 533-34, 419 P.2d 324 (1966)). The State, as the prevailing party, has the primary obligation of presenting findings, which accurately reflect the trial court's oral ruling, but the trial court also shares some responsibility of ensuring that the record is complete. State v. Portomene, 79 Wn. App. 863, 865, 905 P.2d 1234 (1995). In the absence of specific findings on a particular issue, an appellate court may examine the trial court's oral opinion to determine the basis for the trial court's resolution of the issue. State v. Frodert, 84 Wn. App. 20, 24 n. 2, 924 P.2d 933 (1996). Lack of findings or late entry of findings only requires reversal where the defendant can

show “tailoring” to address appellate issues or prejudice. State v. Eaton, 82 Wn. App. 723, 727, 919 P.2d 116 (1996).

Here, the court failed to timely enter written findings of fact and conclusions of law after the SSOSA revocation hearing. Thereafter, the State entered written findings on November 33, 2009 [Appendix “A”]. Churchill submits to this court that the findings entered in this matter have been tailored to address the issues raised in his brief. The mere fact that findings were entered has done so since Churchill has raised the issue of such lack findings. Moreover, the findings evidence impermissible tailoring as they omit any reference to the credibility of any of the witnesses testifying at the hearing including but not limited to Churchill and M.Y.. In omitting these “facts” from the findings and drafting the challenged conclusions as it has done, the State has improperly curtailed the arguments presented by Churchill in his opening Brief of Appellant.

Since the State failed to timely prepare and enter the findings and those findings have been curtailed, Churchill has been prejudiced and this court should reject consideration of them and reverse the trial court’s ruling and reinstate Churchill’s SSOSA for the reasons argued herein and in his Brief of Appellant.

E. CONCLUSION

Based on the above, DDC respectfully requests this court to reverse the trial court and reinstate his SSOSA.

DATED this 24th day of December 2009.

Patricia A. Pethick
PATRICIA A. PETHICK
Attorney for Appellant
WSBA NO. 21324

CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 24th day of December 2009, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Oscar J. Churchill
DOC# 308577
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

Carol La Verne
Thurston County Dep. Pros. Atty.
2000 Lakeridge Drive SW
Olympia, WA 98502

Signed at Tacoma, Washington this 24th day of December 2009.

Patricia A. Pethick
Patricia A. Pethick

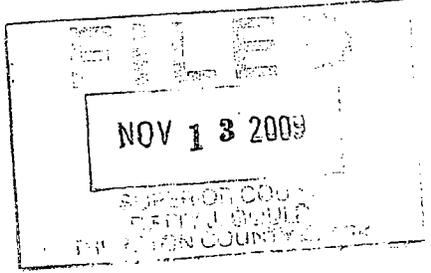
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BY: [Signature]
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APPENDIX "A"

Findings of Fact and Conclusions of Law

Filed November 13, 2009

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**IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY**

STATE OF WASHINGTON,

vs.

OSCAR CHURCHILL

Plaintiff,

Defendant.

NO. 06-1-00838-7

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW RE:
SSOSA REVOCATION HEARING**

On March 17, 2009, on the above titled matter, a hearing was held before the Honorable Carol Murphy. The court heard the testimony of Michael Boone, M.Y., Marty Gunderson, Patrick Seaberg, Brian Cobb and Oscar Churchill, as well as arguments from both the STATE and the DEFENSE. The court considered the testimony and the arguments and finds the following facts:

I. FINDINGS OF FACT

1. Oscar Churchill was a participant in a sex offender treatment program as proscribed under his SSOSA sentence, which he received on July 13, 2007. At the time of the incidents, he had been in treatment for just over two years.
2. While serving his SSOSA sentence, Churchill's CCO, Michael Boone, reported several violations which resulted in Churchill being sanctioned and receiving 30 days in jail.
3. Appendix "F" of Churchill's SSOSA sentence prohibited him from having contact with minor children and being in places where children congregate.
4. On September 21, 2009, Churchill took his dog and rode his bike back and forth around one side of a wooded trail in the greenbelt area of his neighborhood, near 9137 Cherry Drive, Olympia, where a 13-year old female, M.Y., was also present. M.Y. was located in the field next to the wooded area. Even though Churchill saw M.Y. alone in the area, he did not testify that he turned around and left it upon finding M.Y. there. No contact

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW — CrR 3.6 HEARING**

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or communication occurred between Churchill and M.Y. at this time, although they both testified that they saw the other.

5. Prior to September 21, 2009, M.Y. had never seen Churchill and was unaware of his sex offender status until M.Y.'s next-door neighbor informed her of it after the above noted incident. M.Y.'s neighbor warned M.Y. not to have contact with Churchill due to his status.

6. A week later, on September 28, 2009, Churchill again took his dog and rode his bike around the same wooded area as before. M.Y. was again present, but this time she was sitting on a rock near the wooded area. When Churchill passed where she was sitting, he initiated contact with M.Y., saying either "hi" or "hello" to her to which she responded with a non-verbal acknowledgement (head nod). After Churchill passed, M.Y., who was upset due to a fight with her mom, went into the woods to cry until her mom called her in to the house (which was across from the woods). M.Y. then reported the incident to her mother, who reported it to the police. Even though Churchill saw M.Y. alone in the area, he did not testify that he turned around and left it upon finding M.Y. there.

~~7. M.Y. did not recall seeing Churchill in the greenbelt area prior to these two incidents, but did know that he passed by her house on other occasions, although she did not believe it was intentional.~~

8. Marty Gunderson, a polygraph examiner who examined Churchill regarding the September 21st and 28th incidents determined that Churchill answered with deception on question #44, "Did you have verbal contact with the girl you saw the days you were riding around your neighborhood?", when Churchill denied contact. In response to questions #43, "Have you had any unreported contact with minors since your last polygraph?", and #45, "Have you had any sexual fantasies involving minors since your last polygraph?", Churchill again denied either occurred. Gunderson determined these answers were inconclusive.

9. Patrick Seaberg, another polygraph examiner, examined Churchill as well and determined that Churchill was being truthful. However, after Gunderson was given an opportunity to briefly review Seaberg's same charts, Gunderson testified they appeared to be inconclusive (i.e. not "non-deceptive" results), not truthful.

10. Churchill admitted that he rode his bike with his dog in the greenbelt area several times a week and that he had seen M.Y. in the area, but denied having ever had any contact with her or any other minor female. He did not, however, state that upon seeing her in the greenbelt area, on either occasion, he immediately left the area.

II. CONCLUSIONS OF LAW

1. Churchill was fully aware of the restrictions of his SSOSA sentence.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW - CrR 3.6 HEARING

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- 2. SSOSA requires complete compliance.
- 3. Churchill did not violate the terms of his SSOSA sentence in the first incident on or about September 21, 2008. However, he did violate the terms of his SSOSA sentence by making contact with a minor child on or about September 28, 2008.

Based on the foregoing, it is hereby ORDERED, ADJUDGED, AND DECREED
that:

The STATE's motion to revoke Churchill's SSOSA sentence is granted.

ORDERED THIS 17 day of October, 2009.

Carol Murphy
JUDGE

PRESENTED BY:

APPROVED FOR ENTRY:

DJ
DOMINIQUE L. JINHONG, WSBA #28293
Deputy Prosecuting Attorney

RAF
RODNEY FRANZEN, WSBA # 11818
Attorney for Defendant

FINDINGS OF FACT AND
CONCLUSIONS OF LAW - CrR 3.6 HEARING

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THURSTON COUNTY, WASH.
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