

No. 41110-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

CRAIG D. OLSON,

Appellant.

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

The Honorable, Judge Gary R. Tabor
Cause No. 05-1-00503-7

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the defendant waived assignments of error no. 1 and 3 by failing to raise them before the trial court.

2. Whether the court's lack of yearly review hearings is a necessity and resulted in prejudice to the defendant which should thus result in the defendant's requested remedy of reversal and remand.

3. Whether the court denied the defendant his right to due process under the federal and state constitutions according to the requirements of RCW 9.94A.670(7) and (9).

4. Whether the court abused its discretion in revoking the defendant's suspended sentence.

B. STATEMENT OF THE CASE.

1. The State accepts the appellant's statement of the case, while noting the following corrections, clarifications, and additions:

Procedural:

Olson was granted a SSOSA sentence on 4/5/05 after he pleaded guilty to one count of attempted rape of a child in the second degree and two counts of possession of depictions of minor engaged in sexually explicit conduct. [4/5/05 Felony Judgment and Sentence].

Quarterly reports (i.e. four per year) were submitted to the court detailing Mr. Olson's progress in treatment, both his successes and the areas in which he needed improvement.

On August 9, 2010, Mr. Olson's SSOSA sentence was revoked due to his lack of progress in treatment which resulted in termination from treatment. In revoking Mr. Olson from treatment, the court noted that,

[T]o not successfully complete the program is of great concern. What I've heard is Mr. Olson was getting tired of being in the program. He spoke to other people about how long is this treatment provided going to keep me around here? When is she going to let me go? He was tired of his probation officer prohibiting certain travel. . . . I am troubled by the fact that there was deception going on. I think that was the primary opinion of the treatment provider. I think she candidly said that it was the fact that while she reported he was making great progress and he was within one final report of being released from SSOSA, that was because she did not know that he was being dishonest about his use of alcohol.

[RP 53-54]. The court then stated that whether alcohol is a precursor to the offense is "not really the important question." [RP 53]. It observed,

[The prohibition against alcohol] was clearly a condition of sentence. It was contained in the Judgment and Sentence Appendix H dealing with community custody, specifically subparagraph (b)(13). Another was (b)(19) which said to submit to polygraph testing as required by your therapist or CCO to monitor compliance with the sentence, and that included the use of alcohol. The polygraph was completely appropriate on that particular issue, and it did show he tried to get away with it and lie about it. He then said he had only consumed alcohol while cooking. That had been addressed earlier. He had

been told that was inappropriate, but that was minimization because he later acknowledged that he also would have up to a half an ounce on a number of occasions to deal with stress.

Dealing with stress is something that is clearly a part of the program in my opinion, and he needed to deal with a number of issues. While I look at his reports, the quarterly reports that were submitted to the court, he was succeeding in a number of ways, but there were still areas that he needed to be working on, and one of those areas in a great number of the reports is that he needed to be able to cope with depression or anxiety. He needed work on that a number of times. He also needed work on having appropriate sexual and affectional outlets. I'm also greatly concerned that when all of this was coming to a head, what did he choose to do? Appears to me that what he chose to do was to get out of Dodge, to run.

[RP 53-54]. As a result of his revocation, the court imposed Mr. Olson's suspended sentence of 93.75 months.

Substantive:

Mr. Olson was arrested following a sting where he arranged online and via telephone to meet an undercover officer disguised as a 13-year-old female at the Capitol Mall food court. [3/24/05 Probable Cause Statement]. He was arrested after approaching the undercover officer, as arranged, at the food court. [3/24/05 Probable Cause Statement]. Upon arrest, officers located the defendant's van in the mall parking lot containing two apparent suitcases, a computer case, a computer box, and an inflatable

mattress. [3/24/05 Probable Cause Statement]. A search incident to arrest of Mr. Olson resulted in discovery of a note listing the meeting location, meeting time, directions to the mall, the officer's assumed name of "Whitni," her clothing description, and a lollipop. [3/24/05 Probable Cause Statement].

In evaluating Mr. Olson's appropriateness for a SSOSA sentence on June 30, 2005, Michael Comte of Comte & Associates, LICSW, ACSW, and a certified Sex Offender Treatment Provider, [CP 117], Mr. Comte did not diagnose Mr. Olson with any mental illness or psychopathy. [CP 114]. He stated that "despite schizoid personality features, [Mr. Olson] enjoys interacting with customers" which are behaviors inconsistent with a schizoid personality disorder. [CP112]. Further, he stated because Mr. Olson did not satisfy the criteria for psychopathy, "other personality disorders should be considered" and that a "schizoid personality disorder seems the most relevant." [CP114]. Notably, he did not actually diagnose Mr. Olson as having a schizoid personality disorder, but rather observed some features consistent with such a diagnosis, while other traits as not. He described Mr. Olson as "immature, shallow, and self gratifying." [CP 116].

He then assigned the case to Jeanglee Tracer of his office suggesting treatment focus on conditioning “to move him along the development line to reinforcing arousal to adult women[,]” engage him in a “cognitive and behavioral . . . weekly individual and group” therapy with emphasis on “victim psychology.” [CP 116]. He further directed, in part, that Mr. Olson be “encouraged to participate in activities with adults[,]” “required to adhere to all aspects of the Courts’ sentencing order and his treatment plan[,]” “prohibited from alcohol and nonprescription drug use and polygraph examination should verify compliance.” [CP 116-117]. Nothing in Mr. Comte’s treatment recommendation apparently directs Mr. Olson be treated specifically for a schizoid personality disorder. Brett Trowbridge’s evaluation was conducted at the request of the defendant. [CP 118]. Trowbridge evaluated him as “not at all psychopathic[,]” “dysthmic[,]” and “suffering from a schizoid personality disorder.” [CP 122]. Mr. Trowbridge is not a certified sex offender treatment provider, was not responsible for creating Mr. Olson’s treatment plan, and did not participate in Mr. Olson’s treatment in any way. His opinion was formulated after meeting with the defendant in the Thurston County Jail on May 2, 2005. [CP 118].

Ms. Tracer was Olson's treatment provider throughout the entirety of his time in treatment, first through Comte & Associates and then when she began practicing on her own. Like Mr. Comte, Ms. Tracer did not diagnose Mr. Olson as having a schizoid personality disorder and throughout almost five years of interaction, she did not observe behaviors consistent with such a diagnosis. [RP 30]. During the course of treatment, Tracer testified Olson presented as someone who never thought he belonged in the group, he did not consider himself a person who sexually offended, he did not accept responsibility for his actions, and he consistently minimized events. [RP 21]. She further observed that he struggled with treatment assignments, often having to do several drafts of an assignment, and took three years to complete three assignments. [RP 21]. She testified he identified his triggers, but then never took any preventative measures, and while he was not apparently violating the terms of his sentence, he was not making any progress in treatment by not accepting responsibility for his actions and not making any lifestyle changes. [RP 21].

She stated he appeared to be internalizing the treatment but then he failed a polygraph test regarding his alcohol use. [RP 22-23]. She noted his response to the failure was to minimize the

actions stating he only cooked with Sherry wine. [RP 23]. A year prior to that, however, his CCO told him to stop associating with alcohol after she found multiple wine bottles at Mr. Olson's house. [RP 23]. Following the polygraph failure, Mr. Olson called a member of his treatment group to see if Ms. Tracer knew about the wine and his failed polygraph. [RP 23-24]. This was prior to Mr. Olson disclosing his alcohol use to the group. [RP 24]. At group, Mr. Olson admitted to using alcohol, but claimed he only drank half an ounce on occasion to "quiet his nerves" and that he had been doing so for the preceding eight-plus months. [RP 24]. For the prior eight months, Mr. Olson had signed all of his weekly group check-in sheets as "no" for "consuming alcohol." [RP 25]. Ms. Tracer then testified she felt he was predisposed to alcoholism based on his family history and his use was especially concerning to her because she viewed it as him replacing one maladaptive behavior with another. [RP 26]. Deception was a violation of the treatment program and alcohol use was a violation of both the treatment and the terms of community custody.

On cross-examination, Ms. Tracer clarified to defense counsel that what she thought she observed to be progress, she did not trust as a result of Mr. Olson's long term successful

deceptive practices. [RP 35]. She further clarified that the early reports of progress really equated to Mr. Olson showing up, paying, and participating in the group sessions. [RP 37]. The quarterly reports to the court indicated areas of treatment in which Mr. Olson needed to improve.

On 6/25/10 Mr. Olson was directed by CCO Ohman to report to her office. Mr. Olson informed her he was unable to report until 4:30 pm. At 4:30 pm, he reported and was taken into custody. During a search of his person, CCO Ohman located motel receipts for the preceding evenings indicating Mr. Olson had left the state of Washington and traveled to Montana without permission from his CCO. [RP 10, 18]; [DOC Violation report].

C. ARGUMENT

1. The defendant fails to cite any authority supporting his requested remedy and thus the court should not consider those assignments of error.

In the instant case, the defendant alleges his revocation should be vacated and his order for treatment terminated because the trial court failed to conduct annual treatment reviews per RCW 9.94A.670(8)(b), failed to set a termination hearing three months prior to the anticipated date for completion of treatment under RCW 9.94A.670(7), and failed to give notice of the (non-existent)

treatment termination hearing to the victim at least 14 days prior to said hearing per under RCW 9.94A.670(9).

First and foremost, “[t]he law is well-established that an appellate court need not decide a claim that is not supported by citation to authority.” Mairs v. Department of Licensing, 70 Wash App. 541, 544-45, 854 P.2d 665 (1993) (citing Transamerica Ins. Group v. United Pac. Ins. Co., 92 Wash. 2d 21, 29, 593 P.2d 156 (1979)). Without reference to any case law or statutory authority on remedy sought, specifically the defendant’s request for vacation of the hearing court’s decision and termination of the defendant’s treatment, this assignment of error is waived. Puget Sound Plywood, Inc., v. Mester, 86 Wash. 2d 135, 142, 542 P.2d 756 (1975).

2. The defendant failed to previously raise the issue of annual treatment review hearings, the setting of a termination hearing, or the issuance of 14-day notice to the victim of the termination hearing, and thus waives those issues now.

Second, the State submits that because the defendant also failed to raise any of the above issues at the revocation hearing, they are now waived. In general, appellate courts will not consider issues raised for the first time on appeal. Appellate counsel may only raise it if it is a “manifest error affecting a constitutional right”

because failure to object deprives the trial court of the opportunity to prevent or cure any error. RAP 2.5(a)(3); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). This is a narrow exception to the rule. RAP 2.5(a)(3); Kirkman, 159 Wn.2d at 936. Constitutional errors are treated differently because they can and often do result in injustice to the accused and may affect the integrity of our system of justice. “On the other hand, ‘permitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials, and is wasteful of the limited resources of prosecutors, public defenders and courts.’”¹ State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (cite omitted, emphasis in original).

RAP 2.5(a) concerns errors raised for the first time on appeal:

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. . . .

¹ While the language specifically identifies the negative effects of allowing a defendant to belatedly bring every appealable issue as it pertains to trials, the State submits the language is no less applicable to the hearing at issue in this case.

RAP 2.5(a)(3) does not provide that all asserted constitutional claims may be raised for the first time on appeal. Criminal law is so largely constitutionalized that most claimed errors can be phrased in constitutional terms. . . . Elementary rules of construction require that the term “manifest” in RAP 2.5(a)(3) be given meaning. . . . As the Washington Supreme Court stated in State v. Scott, [110 Wn.2d 682, 687, 757 P.2d 492 (1988),] “[t]he exception actually is a narrow one, affording review only of ‘certain constitutional questions.’”

State v. Lynn, 67 Wn. App. 339, 342-43, 835 P.2d 251 (1992). The constitutional error exception is not intended to afford criminal defendants a means for obtaining a new trial, or in this case a new hearing, whenever one can “identify a constitutional issue not [previously] litigated[.]” Scott, 110 Wn.2d at 687. The Lynn court described the correct analysis in these steps:

First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis. . . . “[M]anifest” means unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed. “Affecting” means

having an impact or impinging on, in short, to make a difference. A purely formalistic error is insufficient.

Lynn, *supra*.

"Manifest" error under RAP 2.5(a)(3) requires a showing of actual prejudice, which requires "a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case." Kirkman, 159 Wn.2d at 935 (quoting State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)). "If a court determines the claim raises a manifest constitutional error, it may still be subject to the harmless error analysis." Kirkman, 159 Wn.2d at 927.

- a. None of the alleged errors are constitutional in nature, let alone rise to the level of manifest error, but most specifically the issues of annual reviews or 14-day notice to the victim do not qualify for review, and thus are waived.

The State would first argue that none of these issues are constitutional in nature, let alone rise to the level of manifest error, despite the defendant's attempt to couch the court's failure to set the termination hearing in terms of a due process claim. As Lynn notes, "RAP 2.5(a)(3) does not provide that all asserted constitutional claims may be raised for the first time on appeal. Criminal law is so largely constitutionalized that most claimed errors

can be phrased in constitutional terms.” Lynn, 67 Wn. App. at 342-43.

Notably, the defendant fails to even allege that either the lack of annual reviews or lack of a 14-day notice to the victim (an issue which the State also argues Mr. Olson does not have standing to raise and which the record does not dispositively support the occurrence or nonoccurrence of),² signify any constitutional issue, let alone rise to a manifest error claim. The State asserts the defendant fails to make this claim because he recognizes the same. The complete lack of supporting case authority is further evidence that neither claim is reviewable for the first time on appeal. As a result, his failure to raise the claims to the hearing court waives those issues.

Additionally, even if he were to allege they were constitutional errors of manifest import, Mr. Olson fails to cite any actual prejudice suffered. He states that had the court conducted

² If anything, it would be the victim's injury in fact to claim, not the defendant's and he makes no effort to make it so. He simply has no right to assert such a claim on behalf of his victim. See generally Ortiz v. Fibreboard Corp., 527 U.S. 815, 831, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999) (discussing standing of victims in a class action suit); Miller v. Albright, 523 U.S. 420, 118 S. Ct. 1428, 140 L. Ed. 2d 575 (1998) (discussing third-party standing requirements); Whitmore v. Arkansas, 495 U.S. 149, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990) (death row inmate did not have standing to protest death and execution of fellow inmate). Additionally, it did not appear to the State that there was anything in the record to indicate whether the victim was or was not, actually, sent 14-day notice of the termination hearing.

the review hearings and sent notice to the victim, then “problems that could have been addressed” would have been. [Appellant brief, 28] Instead, he argues, they went unaddressed and precipitated into grounds for revocation. He guesstimates that had annual reviews been held, then they “might have been used to”³ (1) address the defendant’s difficulty in attaining certain treatment goals—goals which the treatment provider was properly addressing through treatment itself and which the court would not have played a role in dictating, [Appellant brief, 27]; (2) inquire into the effect of his schizoid personality, [Appellant brief, 27]—a disorder that the original diagnosis mentioned but did not specifically include⁴ and was further inconsistent with the behaviors she observed during treatment, [RP 29-31]; (3) add therapeutic measures specifically to address the disorder—a disorder her employer again acknowledged as potentially relevant, but did not expressly diagnose the defendant as having, [Appellant brief, 27]; (4) address alcohol use—use that did not come to the treatment provider’s attention until just prior to termination and for which there is no

³ This language is speculative by definition.

⁴ Tracer’s employer completed the original diagnosis and gave her the case to address based on that diagnosis. The diagnosis referred to by the defendant is not controlling and Tracer should not reasonably have included it in her treatment. Rather, The testimony indicates she conducted Mr. Olson’s treatment in accordance with Mr. Comte’s treatment plan recommendations.

evidence Mr. Olson's CCO would have informed the provider of had there been annual reviews, [Appellant brief, 27]; (5) re-examine whether intervention for alcohol abuse was necessary—again where there was no clear indication a problem existed due to Mr. Olson's deception, [Appellant brief, 28]; and (6) set a treatment termination date—which, again, there is no clear indication this would have occurred simply because the court held an annual review. [Appellant brief, 28]. All of the alleged prejudice in failing to conduct annual reviews is speculative at best.

Up until the point of revocation, the reports submitted to the court, while not glowing, per se, indicated compliance with and progress in the treatment process. In fact, the treatment provider testified she was preparing Mr. Olson's treatment completion report when she received the failed polygraph indicating deception. Confirmation from the defendant that not only had he not told Tracer or his group about his violations for the preceding eight months, but also that he had been lying weekly on his check-in sheets was further evidence of a long period of deception as well as evidence that he had not progressed appropriately in treatment where honesty is considered the number one indicator of treatment progress. [RP 23-25, 35, 38].

In sum, there is simply no evidence that the complained of information would have come to light any sooner than it did had annual reviews occurred. Olson would have continued to be deceptive in order to move through the program and his treatment provider and CCO would apparently have been none the wiser. It is additionally unclear to the State how providing notice to the victim of any such termination hearing would have facilitated the court's earlier enlightenment of the deceptive behavior and Mr. Olson fails to provide any such explanation or evidence to support such a claim. In reality, the information came to the court's attention as soon as the therapist and CCO received the information.

- b. The non-setting of a termination hearing is also waived because it did not result in a constitutional error rising to the level of manifest error.

First, the State submits that the sentencing court's failure to set a termination hearing is also waived for the reasons listed above. Moreover though, in order for this court to review the issue for the first time on appeal, the defendant must 1) demonstrate it is, in fact, a constitutional issue, 2) show that is one of manifest importance having practicable and identifiable consequences in the trial of the case (i.e. the defendant must demonstrate actual prejudice, not merely speculative prejudice), 3) if he can show that

it is of manifest importance, then he must address the merits of the constitutional issue (i.e. whether manifest error actually exists), and 4) if there is manifest error, then Mr. Olson must show the error was not harmless. It is the State's position the defendant fails to do all of the above. He does not show how it is a constitutional issue, demonstrate any actual prejudice, or even argue it is of manifest importance and that the resulting error was not harmless. Thus, this court should not review his claim on this additional basis because he waived it.

i. No violation of the Due Process Clause occurred.

Even if this court deems the alleged Due Process claim raises a constitutional issue meriting closer review, the State asserts the defendant's claim still fails. A standard Due Process analysis occurs in two steps: 1) whether a person has been deprived of a liberty or property interest, and 2) whether the procedures followed by the State were constitutionally sufficient. Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 460, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989).

"A criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man." DA's Office v. Osborne, 129 S. Ct. 2308, 2320, 174 L. Ed. 2d 38 (2009). "Given a

valid conviction, the criminal defendant has been constitutionally deprived of his liberty.” Conn. Bd. Of Pardons v. Dumschat, 452 U.S. 458, 464, 101 S. Ct. 2460, 69 L. Ed. 2d 158 (internal quotation marks and alterations omitted). “The revocation of a suspended sentence is not a criminal proceeding. . . . An offender facing revocation of a suspended sentence has only minimal due process rights.” State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 3996 (1999) (citing State ex rel. Woodhouse v. Dore, 69 Wn.2d 64, 416 P.2d 670 (1966); State v. Nelson, 103 Wn.2d 760, 762-63, 697 P.2d 579 (1985))) (one under a conditional suspended sentence order has a very limited liberty interest, entitling them to minimal due process rights). “Sexual offenders who face SSOSA revocation are entitled to the same minimal due process rights as those afforded during the revocation of probation or parole.” State v. Badger, 64 Wn. App. 904, 907, 827 P.2d 318 (1992).

First, the defendant alleges the inclusion of the term “shall” in the setting of a termination hearing at a specified time and the non-occurrence of that hearing within the initial three year period is clear evidence of the creation of a liberty interest.⁵ He then notes RCW 9.94A.670(9) substantively limits the court’s actions at the

⁵ Notably, RCW 9.94A.670(5)(c) authorizes the court to impose “[t]reatment for any period up to five years in duration.”

hearing by stating the court's choices are limited at that point to a) modifying conditions of community custody, b) terminating treatment, or c) extending treatment in two-year increments for up to the remaining period of community custody.

However, the defendant fails to cite any controlling case law which states a defendant has a specific liberty interest in the setting of his SSOSA termination hearing at the time of sentencing. Again, the cases he cites as support for his proposition, for example Vitek v. Jones, 445 U.S. 480, 493, 100 S. Ct. 1254, 1265, 63 L. Ed. 2d 552 (1980), Washington v. Harper, 494 U.S. 210, 221, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990), Young v. Harper, 520 U.S. 143, 145, 117 S. Ct. 1148, 137 L. Ed. 2d 270 (1997), Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979), Hewitt v. Helms, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983), and Sandin v. Conner, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995) are all cases involving already incarcerated prisoners which is wholly unlike the facts of this case where Mr. Olson was out of custody at the time of the revocation. Likewise, Morrissey v. Brewer is inapplicable to the instant facts because Mr. Olson received the

procedural due process requirements that Morrissey was denied.⁶
408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)

Simply pointing to the use of the term "shall" does not inherently create a liberty interest resulting in a due process violation. In fact, the Supreme Court of the United States has stated multiple times that "a 'mere error of state law' is not a denial of due process." Engle v. Isaac, 456 U.S. 107, 121, n. 21, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982). This appears to be the crux of Mr. Olson's argument, however, and unfortunately, it too fails. This is a fundamental misunderstanding of how a liberty interest is created and further only addresses half of the due process equation.

Additionally, the defendant overlooks the combination of RCW 9.94A.670(5)(b) which states the court "must" impose

[a] term of community custody equal to the length of the suspended sentence, the length of the maximum term imposed pursuant to RCW 9.94A.507, or three years, whichever is greater, [in this case 93 months], and require the offender to comply with any conditions imposed by the department under RCW 9.94A.703.

That section combined with RCW 9.94A.670(11), which states the "court may revoke the suspended sentence at any time during the period of community custody and order execution of the sentence

⁶ This will be explained in further detail in the following section discussing the minimum due process requirements for revocation hearings.

if: (a) [t]he offender violates the conditions of the suspended sentence, or (b) the court finds that the offender is failing to make satisfactory progress in treatment,” indicates that at any time during either the period of treatment or the defendant’s term of community custody, the court may impose the suspended sentence. Proof of violation need not be established beyond a reasonable doubt. The court need only be reasonably satisfied that the breach of a condition occurred and revocation of a suspended sentence rests solely within the discretion of the court. State v. Badger, 64 Wash. App. 904, 908, 827 P.2d 318 (1992); see State v. Ramirez, 140 Wn. App. 278, 165 P.3d 61 (2007) (Under the plain language of the statute, a trial court need only consider whether the offender violated the SSOSA conditions or failed to make satisfactory treatment progress.); State v. Dahl, 139 Wn.2d 678, 990 P.2d 396 (1999) (An offender’s SSOSA alternative may be revoked at any time if the court is reasonably satisfied that the offender has violated a condition of his suspended sentence or failed to make satisfactory progress in treatment.); State v. Danials, 73 Wn. App. 734, 871 P.2d 634 (1994) (The conditions of a suspended sentence are imposed on the suspension of the sentence; if a condition of a

suspended sentence is violated, the court may revoke the sentence and order its execution.) To read the statute as the defendant implies would make that language irrelevant.

In short then, regardless of whether the defendant is in treatment, or out of treatment and in community custody, the court has the discretion to revoke his SSOSA and impose the suspended sentence at any point if it determines that either a) he has violated a condition of his sentence or b) he failed to make satisfactory progress in treatment. There is no apparent existing authority which says the court's failure to set annual review hearings or set a termination hearing at the time of sentencing terminates the court's ability to revoke a defendant's SSOSA for either of the two reasons given under RCW 9.94A.670 (11). If that were the legislature's intent, then it would be included in the statute—but it is not.

Moreover, even if the defendant did have a liberty interest specifically in the setting of the termination hearing at the time of sentencing, there is still nothing in either case law or statute that limits the court's ability to revoke a SSOSA during the period the defendant is subject to the conditions of community custody and treatment. As a result, the State avers the setting of the termination hearing is not a constitutional issue imbuing the defendant with a

liberty interest. While, the trial court may not fashion conditions such that the length of time spent in treatment is in excess of that provided for in the statute, State v. Onefrey, 119 Wn.2d 572, 835 P.2d 213 (1992), the statute specifically notes that treatment may be imposed for any period up to five years. RCW 9.94A.670(5)(c). In this case, the defendant's treatment did not exceed five years and thus was not in excess of the statute.

Second, in revocation hearings such as the one at issue in this case, a defendant's minimal due process rights include:

- (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 the revocation.

Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). The defendant states that the purpose of the due process clause is to "protect the individual from arbitrary and erroneous State action by requiring some kind of hearing prior to the deprivation of 'life, liberty, or property.'" [Appellant brief, 29]. That is exactly what occurred in the instant case, but Mr. Olson chooses to ignore the facts. The transcripts clearly indicate he

received a hearing which met all of the above standards prior to the revocation of his SSOSA sentence—he received notice, knew of the alleged violations and came to court with counsel prepared to address them, had the opportunity to be heard in response to the alleged violations, had the opportunity to cross examine the State's witnesses, had a neutral and detached magistrate, and received a statement by the court as to the evidence which the court relied upon and the reason for the revocation—and he does not aver otherwise. As a result, his argument that he did not receive an appropriate hearing prior to termination fails.

Additionally, the cases he cites to are inapplicable to the instant case. Those cases involve State deprivations imposed on prisoners (which Mr. Olson was not) and parolees where the deprivation was so far outside the normal conditions of custody that it could be considered outside the terms of the imposed sentence and seemingly arbitrary. Here, the court's revocation of Mr. Olson's SSOSA sentence and the imposition of his suspended sentence was wholly within the terms of his original sentence. In order to avoid imposition of his suspended sentence, he had to satisfactorily progress in treatment and he failed to do so due to his deceptive behaviors. The court did not craft a new, unusual, or arbitrary

sentence not originally described in Olson's sentence. Rather, it properly exercised its discretion in finding that Mr. Olson failed to comply with the terms of his SSOSA sentence.

- ii. No actual prejudice exists due to the non-setting of a termination hearing at the time of sentencing.

Even if this court were to consider this assignment of error, the defendant fails to make a showing of actual prejudice for the same reasons stated in section 2(a) of this brief. Any claim of prejudice is both speculative and conclusory. There is no evidence to indicate the setting of the termination hearing at the time of sentencing (or even the occurrence of it at the three-year mark) would have resulted in a different outcome.

Mr. Olson's argument ignores the fact that he managed, through deception, to get away with violating the terms of this treatment and community custody for the preceding eight-plus months, thereby gaining the benefit of the doubt from both his treatment provider and CCO up until the point they discovered the deception, and generally drag his feet through the program for the period prior. If Mr. Olson had successfully progressed the provider and CCO likely would have recommended Mr. Olson for program completion at the three-year mark, but they did not. Even without a

termination hearing set, at the five-year mark they took it upon themselves to recommend him for completion based on his apparent progress. This indicates to the State that their evaluation of him was solely based on his progress in the program and not simply the setting of a court date.

Mr. Olson essentially now points to the lack of negative progress reports throughout, choosing to ignore the witnesses' testimony at the hearing, and asks this court to give him credit for the time he was able to deceive both women. This is contrary to the purpose of a SSOSA sentence. Both the treatment provider and CCO testified Mr. Olson struggled for quite awhile in treatment, complaining about his community custody terms, avoiding responsibility for his actions, not taking the suggestions of the therapist, getting stopped in his assignments, and generally looking for the shortest way out of everything. The provider and the CCO both gave Mr. Olson the benefit of the doubt, however, in the hopes he would finally internalize the treatment. They gave him additional time to progress in treatment rather than recommending him for termination. If anything, this shows Mr. Olson likely benefited from the non-setting of a termination hearing in that he was afforded an

opportunity to stay in the program that he would not otherwise have received.

As a result, the defendant simply fails to show any actual prejudice resulted from the lack of setting of a termination hearing at the time of sentencing and his failure to raise the issue at the trial court level at the time waives it now.

3. The sentencing court did not abuse its discretion in revoking Olson's SSOSA sentence and imposing the suspended sentence.

A reviewing court will find an abuse of discretion when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State v. Dixon, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006), citing State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based "on untenable grounds" or made "for untenable reasons" if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. Id. A decision is "manifestly unreasonable" if the court, despite applying the correct legal standard to the supported facts, adopts a view that "no reasonable person would take," and arrives at a decision "outside the range of acceptable choices." Id. A decision will not be disturbed on review without a

clear showing that an abuse of discretion occurred. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (citations omitted).

Proof of violation need not be established beyond a reasonable doubt. Badger, 64 Wash. App. at 908. The court need only be reasonably satisfied that the breach of a condition occurred; revocation of a suspended sentence rests solely within the discretion of the court. Id. The court clearly stated its reason for revoking Mr. Olson's sentence was because "he did not successfully complete the SSOSA program." [RP 52]. The State submits this cannot reasonably be construed any other way, especially in light of the rest of the court's statements, than to mean the defendant did not successfully progress in his treatment. Certainly if he had, then he would have completed the SSOSA program within five years, but that was not the case. The defendant's argument that the court must have meant something else by this is not consistent with the record. The court stated,

[T]o not successfully complete the program is of great concern. What I've heard is Mr. Olson was getting tired of being in the program. He spoke to other people about how long is this treatment provided going to keep me around here? When is she going to let me go? He was tired of his probation officer prohibiting certain travel. . . . I am troubled by the fact

that there was deception going on. I think that was the primary opinion of the treatment provider. I think *she candidly said that it was the fact that while she reported he was making great progress and he was within one final report of being released from SSOSA, that was because she did not know that he was being dishonest about his use of alcohol.*

[RP 53-54]. The court went on to address defense counsel's argument that the use of alcohol is not a qualifying precursor which the court was allowed to consider in its decision to revoke and which the State resubmits here. As the court said at the hearing, whether alcohol is a precursor to the offense is "not really the important question." [RP 53]. It went on to say,

[The prohibition against alcohol] was clearly a condition of sentence. It was contained in the Judgment and Sentence Appendix H dealing with community custody, specifically subparagraph (b)(13). Another was (b)(19) which said to submit to polygraph testing as required by your therapist or CCO to monitor compliance with the sentence, and that included the use of alcohol. The polygraph was completely appropriate on that particular issue, and it did show he tried to get away with it and lie about it. He then said he had only consumed alcohol while cooking. That had been addressed earlier. He had been told that was inappropriate, but that was minimization because he later acknowledged that he also would have up to a half an ounce on a number of occasions to deal with stress.

Dealing with stress is something that is clearly a part of the program in my opinion, and he needed to deal with a number of issues. While I look at his reports, the quarterly reports that were submitted to the court, he was succeeding in a number of ways, but there were still areas that he needed to be working on, and one of those areas in a great number of the reports is that he needed to be able to cope with depression or anxiety. He needed work on that a number of times. He also needed work on having appropriate sexual and affectional outlets. I'm also greatly concerned that when all of this was coming to a head, what did he choose to do? Appears to me that what he chose to do was to get out of Dodge, to run.

[RP 53-54]. It seems apparent to the State that the court shared the same concerns as that of both the treatment provider and the CCO and so it ruled accordingly. Mr. Olson had not only violated the terms of his community sentence by using alcohol and leaving the state without his CCO's permission, but each of these had larger ramifications as it related to his progress (or lack thereof) in treatment. Mr. Olson's deception and inability to deal appropriately with stress in his life (i.e. by not using alcohol or fleeing the state), as well as the information contained in the quarterly reports, was a wholly tenable reason for the treatment provider to terminate the defendant from treatment, but more specifically for the court to rely on in revoking Mr. Olson's SSOSA. The record is clear that the court did not rely merely on the termination of treatment by the

provider, but rather looked at the whole picture in determining the reasonableness of the actions of all parties involved.

Mr. Olson's argument now that a simple of use of alcohol is a technical violation only and cannot result in the revocation of a SSOSA sentence because, in his opinion, it was not a "precursor activity or behavior" is no more persuasive now than it was during the revocation hearing. Not only does it view the usage in a vacuum, but it also ignores the previously cited language of the RCW which allows the court to revoke a SSOSA if it finds the defendant has either a) violated a condition of his sentence or b) failed to make satisfactory progress in treatment.

In this case, the record clearly indicates the court found that both events occurred and under Badger it appropriately used its discretion in imposing Mr. Olson's suspended sentence. Mr. Olson's argument to the contrary attempts to limit the scope of the court's discretion to facts he finds sufficient versus facts both the treatment provider and the court deemed reasonable. His argument misses the mark and is not supported by case authority. Based on the facts presented, neither the treatment provider nor the court

acted erroneously. Most certainly, the court did not abuse its discretion and thus the defendant's argument fails here as well.

D. CONCLUSION

For the reasons previously stated, the State respectfully requests this court to affirm this conviction.

Respectfully submitted this 4th of May, 2011.



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Attorney for Respondent

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CERTIFICATE OF SERVICE

11 MAY -5 AM 9:16

I certify that I served a copy of the Respondent's Brief of the
date below as follows:

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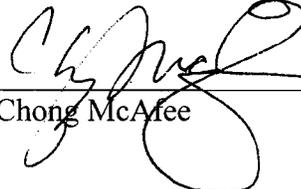
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I certify under penalty of perjury under laws of the State of
Washington that the foregoing is true and correct.

Dated this 4th day of May, 2011, at Olympia, Washington.



Chong McAfee