

ORIGINAL

NO. 41435-0-II

IN THE COURT OF APPEALS OF STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON

Respondent,

v.

WARREN HELZER

Appellant.

11 APR -1 PM 1:00  
STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY  
DIVISION II

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE  
WASHINGTON, PIERCE COUNTY  
The Honorable Judge Thomas Felnagle

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when it revoked the SOSSA suspended sentence solely because Helzer was considering a change in treatment providers.

2. The trial court was limited to considering only the sentencing violation alleged in the violation report.

Issues Pertaining to the Assignments of Error

1. Did the trial court abuse its discretion in revoking Helzer's suspended sentence simply because Helzer stated that he was considering changing treatment providers, a privilege granted him under the SSOSA statute?

2. May the order of revocation be sustained on any other basis when the only alleged violation was that Helzer "failed to comply with sexual deviancy treatment resulting in termination from sexual deviancy treatment on or about 8/11/10 in Pierce County, Washington" and that "failure" was Helzer's consideration of a change in treatment providers?

B. STATEMENT OF THE CASE

Warren Helzer entered a plea to three counts of child molestation in the first degree. The alleged victims were his children. On February 8, 2010 he was sentenced to 130 months in prison. The bulk of the prison

time was suspended and Helzer was placed on community custody pursuant to the Special Sexual Offender Sentencing Alternative [SSOSA] RCW 9.94A.670.

Helzer's state certified treatment provider was Maureen Saylor. She saw Helzer six times in 2009 before he entered a plea. During those sessions, she "saw him to determine if I thought he was treatable." She concluded he was and the SSOSA was granted. CP 25-30.

Following the plea, Saylor told Helzer she would see him while he was serving his jail time. She failed to do so, however. In her report she stated that:

It took awhile to renew my jail clearance and then when I tried to see him on a couple of occasions I didn't find satisfactory parking. Additionally I determined such visits would take 2 hours for travel, getting in and out of the jail and the sessions. It was not cost effective and I realized I shouldn't have agreed in the first place.

CP 26.

Thus, the first time Ms. Saylor saw Mr. Helzer for therapy was July 7, 2010.<sup>1</sup> CP 26. During that session Mr. Helzer told Ms. Saylor that he had met with another treatment provider, Robert Hirsch, while he was in jail. CP 27. He was not sure that:

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<sup>1</sup> She reports that she then had to cancel Helzer's other appointments in "mid-July" because she was "sick for 2 ½ weeks." CP 26.

he wanted to stay in therapy with me. He said he felt that the process was punitive and not helpful to his healing process. He said that he believed Mr. Hirsch treated people differently and worked with clients using love and spirituality. I explained that he would have to go back to court and have a hearing because his order said that he could not change providers without the judge reviewing and ordering the change. After our conversation he said he wasn't sure what he wanted to do. I told him he needed to think it through and decide whether he wanted to continue with treatment with me or go back to court and request a change. He was given a week to think his decision through and let me know at the next session.

CP 28-29.

At the next session, on August 11, 2010, Mr. Helzer:

told me he intended to seek treatment with someone else and wanted to know what would happen. I described the usual process. He implied that he had a right to change providers. I told him I didn't think there was actually a right involved, but a process he had to go through before he could change, including a hearing before a court.

CP 29.

As a result of this conversation, Ms. Saylor told Mr. Helzer that she was not going to continuing treating him while he "looked for another provider." CP 29. Instead, she told him that she was going to terminate him from treatment. Ms. Saylor filed a report on August 25, 2010. CP

28-30. The report began with the following paragraph:

This report is being written because Mr. Helzer requested to leave treatment with this provider and as a result has not finished in SSOSA treatment. He said he viewed the treatment program/methods as punitive and not meeting his needs to "complete my healing." He informed me he had

found another provider who provides treatment using love and spirituality. As a result of his request he was terminated from treatment following his treatment session on 8/11/10.

CP 25.

On August 12, 2010, the State filed a “Petition for Hearing to Determine Noncompliance with Condition or Requirement of Sentence.” CP 21-23. That petition alleged one violation: “Defendant has failed to comply with sexual deviancy treatment resulting in termination from sexual deviancy treatment on or about 8/11/10 in Pierce County, Washington.” CP 21.

Ms. Saylor did not appear for the violation hearing. The state argued revocation was appropriate because Mr. Helzer “tried to dictate the terms of his own treatment.” 10/22/10 RP 6. Mr. Helzer’s community corrections officer [CCO] stated this was not a case of personality conflict between the treatment provider and the defendant. 10/22/10 RP 9. Instead, the community corrections officer stated that Mr. Helzer did not follow the directives of his treatment provider. *Id.* Although Ms. Saylor was not there, the CCO stated that “based upon my conversations with her” Ms. Saylor “wasn’t sure she was capable of dealing with all of the issues he had and she was open to another treatment provider.” 10/22/10 RP 10-11.

Mr. Helzer argued that he had not willfully violated any of the requirements of his treatment provider. 10/22/10 RP 15. Instead, he argued that Ms. Saylor terminated him because he stated he wanted to change treatment providers. *Id.* Also present at the hearing was Ms. Van Paul, a state certified treatment provider who was ready and willing to continue Mr. Helzer's treatment. 10/22/10 RP 18.

The trial judge stated that Ms. Saylor was justified in terminating Mr. Helzer from treatment and revoked the SSOSA sentence. 10/22/10 RP 23. The order revoking the suspended sentence and imposing the balance of the prison time does not contain any further findings of fact or conclusions of law. CP 62.

This timely appeal followed.

#### C. ARGUMENT

1. *The trial court abused its discretion in revoking Helzer simply because Helzer stated he wanted to change treatment providers, a privilege granted him under the SSOSA statute.*

The State alleged that Helzer “failed to comply with sexual deviancy treatment resulting in termination from sexual deviancy treatment on or about 8/11/10 in Pierce County, Washington.” But the State failed to sustain this alleged violation with evidence.

First, there is no evidence Helzer did anything other than tell Saylor he was exploring a different treatment provider. Saylor then unilaterally refused to continue treating Helzer. Saylor's decision to terminate Helzer for investigating a different treatment provider, as permitted by the statute, cannot amount to a "failure to complete treatment" on Helzer's part.<sup>2</sup>

Second, RCW 9.94A.670(5)(c) provides that:

The offender shall not change sex offender treatment providers or treatment conditions without first notifying the prosecutor, the community corrections officer, and the court. If any party or the court objects to a proposed change, the offender shall not change providers or conditions without court approval after a hearing.

Pursuant to the statute, if Ms. Saylor had any objection to Helzer changing providers, her only recourse was to notify the court. Nothing in the statute permits her to unilaterally terminate Helzer from treatment simply because he discussed or considered changing treatment providers. The statute gave Helzer the right to seek such a change with the approval of the trial judge. Given that statutory right, Ms. Saylor's conclusion that Helzer "had failed to complete treatment" is not only untrue, it is illogical. Helzer could

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<sup>2</sup> It is important to keep in mind that the evidence is that Ms. Saylor made this determination at her second treatment session with Helzer upon his release from jail. CP 25. It would be difficult to conclude that Helzer was not satisfactorily progressing in treatment after only two post-release sessions and after Saylor had missed other scheduled sessions and failed to provide the promised treatment sessions while Helzer was in jail.

complete treatment with Saylor or any other treatment provider so long as he had the trial judge's permission to do so. Even before "terminating" him, Saylor explained to Helzer the process by which he could change providers. Helzer's suspended sentence cannot be revoked for simply exploring a privilege given to him by the SSOSA statute itself.

2. *The trial court's order of revocation cannot be sustained on any other basis because the only alleged violation was that Helzer "failed to comply with sexual deviancy treatment resulting in termination from sexual deviancy treatment on or about 8/11/10 in Pierce County, Washington" by exploring new treatment providers.*

An order revoking Helzer's SSOSA for any reason other than the narrow one alleged in the violation report would be invalid. The judge's oral ruling does not clarify the reason for the revocation apart from the judge's general statement that "your violation is not some little misstep. It's the worse thing you can possibly do, get booted out of treatment." RP 23.

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

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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). These requirements exist to ensure that the finding of a violation of a term of a suspended sentence will be based upon verified facts. *Morrissey*, 408 U.S. at 484.

These principles apply to the revocation of a SSOSA sentence under Washington law. A SSOSA may be revoked if a court is reasonably satisfied that an offender has not progressed satisfactorily in treatment or has violated a condition of his suspended sentence. *State v. Dahl*, 139 Wn.2d 678, 683, 990 P.2d 396 (1999). In *Dahl*, the Washington Supreme Court adopted the reasoning of *Morrissey* and applied it to sexual offenders facing SSOSA revocation. The Washington State Supreme Court said that a defendant in Helzer's situation is entitled to the same minimal due process rights as those afforded when probation or parole is revoked:

(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.

*Dahl*, 139 Wn.2d at 683. The requirements are meant to ensure that the finding that an offender violated a term of a suspended sentence is based upon verified facts. *Id.*

Helzer was first denied due process because the trial judge failed to articulate his reasons for revocation as required by subletter (f) under *Morrissey* and *Dahl*. Due process requires that judges articulate the factual basis of a decision because when a trial judge fails to do so, the decision is not amenable to judicial review. *State v. Lawrence*, 28 Wn. App. 435, 439, 624 P.2d 201 (1981). Here, the judge's oral ruling fails to establish the exact factual basis for the revocation and whether his decision was based solely on the violation alleged or some other, improper, considerations such as the fact that Helzer was transgendered. Thus, to the extent that the judge's oral ruling fails to establish his precise factual basis, it must be reversed. And the State cannot now try to support his ruling with other allegations.

Second, the failure by Judge Felnagle to articulate the basis for the order of revocation violates subletter (d) of *Morrissey* and *Dahl* and is not harmless error. Under *Morrissey* and *Dahl*, the trial judge's consideration was limited to the claimed basis for revocation set forth in the written notice of hearing. Otherwise, Helzer would have demanded to cross examine Saylor and the CCO and would have vigorously challenged any

allegations that there were other violations. Therefore, revocation of Helzer's SSOSA sentence would be invalid if it is based on anything other than Saylor's allegation that Helzer was terminated from treatment with her because he was considering a change in treatment providers. That was the allegation he was prepared to defend against at the revocation hearing. He went so far as to bring a new treatment provider to the hearing in order demonstrate his good faith and amenability to continued treatment.

In addition, *Morrissey* requires that a finding of a parole violation be "based on verified facts and that the [court's] exercise of discretion will be informed by an accurate knowledge of the parolee's behavior."

*Morrissey*, 408 U.S. at 484. "Unreliable hearsay may not be the sole basis for revocation...." *State v. Nelson*, 103 Wn.2d 760, 765, 697 P.2d 579 (1985) (emphasis omitted).

Here, Helzer did not object to hearsay from Ms. Saylor's report regarding the issue of treatment providers. In fact, he *agrees* that Ms. Saylor's stated reason for revoking him was that he was exploring a request to the court to change treatment providers. No other reasons were listed as violations when he appeared in court. Therefore, the revocation is invalid as to any other basis for revocation because no other violation was alleged and Helzer did not agree to admission of Ms. Saylor's other hearsay statements in her report to establish any uncharged violations.

In sum, there is a lack of clarity in the trial judge's ruling, but the only basis on which the trial court could have revoked the SSOSA was Helzer's statement that he was exploring a different treatment provider. Because, as explained above, this was not a proper basis for revocation, this Court must reverse.

D. CONCLUSION

This Court must reverse the order revoking the suspended sentence and remand for a new hearing.

Respectfully submitted this 31st day of March, 2011.

  
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Suzanne Lee Elliott, WSBA 12634  
Attorney for Warren Helzer

11 APR - 1 PM 1:00  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

**Certificate of Service by Mail**

I declare under penalty of perjury that on March 31, 2011, I placed a copy of this document in the U.S. Mail, postage prepaid, to:

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*Suzanne La Elliott*