

No. 42918-7-II

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

CITY OF LAKEWOOD,

Petitioner,

Vs.

AARON W. ROBERTS,

Respondent.

PETITIONER'S BRIEF

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I. ASSIGNMENT OF ERROR

The City of Lakewood makes the following assignment of error:

The Lakewood Municipal Court erred in denying the City of Lakewood's Motion to Revoke and further erred in dismissing this criminal matter. (10/14/2010 Muni.Ct.CP. 35).¹ The Pierce County Superior Court erred by affirming the municipal court's decision. (CP 41-42).

II. ISSUE RELATING TO ASSIGNMENT OF ERROR

Under *State v. Marino*, 100 Wn.2d 719, 674 P.2d 171 (1984) and *State v. Kessler*, 75 Wn.App. 634, 879 P.2d 333 (1994), the revocation of a diversion agreement in a criminal case is a two-part inquiry: (1) the prosecutor must establish a violation of the agreement by a preponderance of the evidence; and (2) a prosecutor's revocation decision will be upheld so long as the prosecutor's decision is not unreasonable.

Based on two uncontested violations of criminal law, the City sought revocation of a diversion agreement, which was denied. Because the diversion period expired of its own terms, the case was dismissed pursuant to the diversion agreement. This determination was affirmed by the superior court. Was the requisite deference afforded the prosecutor's decision to revoke Mr. Robert's diversion agreement?

¹ Despite a single document designating the municipal court record, the municipal court record was transmitted to the superior court in three separate installments, and in turn has been transmitted to this Court under separate cover. As such, there is not a traditional clerk's papers citation for the municipal court record. Because of this, we use the designation <<date filed in superior court>> Muni.Ct.CP. <<page number>> for these three filings (10/14/2010, 11/5/2010 and 11/9/2010). The superior court clerk also transmitted, under separate cover, the verbatim report of proceedings before the municipal court on September 30, 2010, and filed with the Superior Court on November 4, 2010. To designate this document we use the form, Muni.Ct.VRP. <<page number>>.

III. BACKGROUND

In January 2008, Aaron Roberts was criminally charged by the City of Lakewood (“City”) in Lakewood Municipal Court with two counts of Malicious Mischief in the Third Degree (one of which included an allegation of Domestic Violence). (10/14/2010 Muni.Ct.CP. 23-24).

To resolve his case, in June 2008, the City and Mr. Roberts entered into a diversion agreement, styled a *Stipulated Order of Continuance With Conditions* (“SOC”), in which Mr. Roberts agreed to comply with a number of conditions over the course of the following 24 months. (10/14/2010 Muni.Ct.CP 25). One of those conditions was to “[h]ave no violations [of] criminal law during the period of the continuance.” If Mr. Roberts complied, the City agreed to dismiss these charges. If Mr. Roberts failed to comply, he waived his right to a jury and stipulated that the judge could review a police report to determine his guilt. By the express terms of the SOC, Mr. Roberts also agreed to waive his right to a speedy trial.

After entering the SOC, Mr. Roberts was twice arrested and charged with new criminal offenses. On March 26, 2009 and again, on April 24, 2010, he was arrested and criminally charged for Driving While License Suspended in the Fife Municipal and Steilacoom Municipal Courts. (11/9/2010 Muni.Ct.CP 2-14). Supported by the respective arresting law officer’s citations and sworn narrative reports, the City sought to revoke the SOC. (Id). Mr. Roberts was able to obtain a reduction of one of these charges to an infraction and forfeited bail on the other matter. (Muni.Ct.VRP 2).

This matter returned to the municipal court for hearing on September 30, 2010. Mr. Roberts did not deny the allegations underlying the new criminal charges. Instead, claimed that he should be given the

benefit of the SOC. The Judge Pro Tem agreed, reasoning,

Well, I'll tell you what I am going to do, and I am, I'm frankly am persuaded by counsel's argument that she has a close professional contact with, with um, Mr. Roberts. I'm not, I'm not going, I'm going to deny the motion to revoke um this Stipulated Order of Continuance in, in, counsel and the defendant should be aware that that's an unusual act for this Court because its Stipulated Orders of Continuance are routinely revoked whenever there is an arguable violation. I'm not going to do that. And the reason I'm not going to do that is because counsel represented that she has close enough contact with Mr. Roberts and that he's been a good enough client that he's reporting to her on a regular basis and I'm. I'm going to give, I'm going to continue to give him the benefit, the benefit of the Stipulated Order of Continuance. But I can absolutely guarantee you that he'll never appear back in front of this Court on a request for a violation again and not have it revoked, have it, um, so we'll set this for [...]

(Muni.Ct.VRP 6; emphasis added).

Because the SOC had otherwise expired, the Municipal Court dismissed the case. (10/14/2010 Muni.Ct.CP. 35). The City appealed. (CP 1).

The Superior Court, in affirming, noted that limited case law was available on pretrial diversions, analogized the situation to a probation revocation proceeding, and reasoned that the municipal court did not abuse its discretion. (CP 41-42). This Court granted the City's motion for discretionary review under RAP 2.3(d)(1), observing that the municipal court, "acted contrary to *Marino* and *Kessler* by not limiting itself to the deferential role established in those cases. And the superior court's affirmance of the municipal court's order similarly conflicts with *Marino* and *Kessler*." (Spindle, *Ruling Granting Review* at p. 3).

IV. ARGUMENT

Marino and *Kessler* set forth a two-part procedure to be followed by a court when a prosecutor seeks to revoke a pretrial diversion agreement. First, the court must determine that there was a violation of the terms of the agreement proven by a preponderance of evidence. *Marino*, 100 Wn.2d at 725-26. Second, the prosecution's decision to terminate the agreement must be "not unreasonable." *Kessler*, 75 Wn.App. at 639.

Instead of evaluating the City's motion under the proper framework, the municipal court did not address either whether the City had proved that Mr. Roberts had violated the SOC or the reasonableness of the City's decision to move to revoke the SOC. Had these standards been correctly applied, the agreement should have been revoked.

The City therefore requests that this Court reverse the decisions below and remand this matter to the Lakewood Municipal Court with instructions to (1) grant the City's motion to revoke; and (2) proceed to a stipulated facts bench trial.

A. Pretrial Division Agreements: A Brief Background.

The SOC at issue is a pretrial diversion agreement. This court recently discussed in *State v. Ashue*, 145 Wn. App. 492, 188 P.3d 522 (2008) the contours of such an agreement. A standard pretrial diversion agreement is an agreement whereby a defendant agrees to a waiver of certain constitutional rights, including the right to a speedy trial, right to a jury trial, and a commitment to abide by certain conditions, and in the event of a violation of the agreement, a defendant agrees that a police report could be reviewed to determine their guilt or innocence. *See e.g. Ashue*, 145 Wn.App. at 501 (citing *Kessler*, 75 Wn. App. at 636; *Marino*, 100 Wn.2d at 720-21). In exchange, upon successful completion of the

agreement, a prosecutor, typically, agrees to the dismissal of the charges. *See id.*²

Although pretrial diversion agreements and other forms of offender supervision, such as statutory diversion agreements and probation share a number of similarities, there are several fundamental differences. It is these differences which are directly implicated in this case.

In the pretrial diversion context, these are agreements which are supervised by the prosecutor – not the court. The prosecutor has the primary responsibility for the supervision of offenders in the diversion context whereas in the probationary realm, “the court has direct supervisory powers,” over the defendant. *Marino*, 100 Wn.2d at 724. Interrelated is the notion that the defendant has not yet been convicted and thus, “the consequences of probation revocation are more serious to a defendant than termination of deferred prosecution to an accused. Following diversion termination, the accused still has the opportunity to clear him or herself of the charges at trial.” *Id.*, 100 Wn.2d at 724.

In view of the “less direct,” role played by the court, the court’s role is most pronounced at two stages of the proceedings. *Marino*, 100 Wn.2d at 724. First, when the agreement is entered into, it is the court that must ensure that a defendant’s waiver of constitutional rights is knowingly, intelligently, and voluntarily waived. *Ashue*, 145 Wn.App. at 502. Second, if termination of the agreement is sought, the Court serves as a neutral fact-finder. *Marino*, 100 Wn.2d at 723.

² We say “typically,” because although *Ashue* recognizes that although dismissal is the remedy, on occasion, a reduction in the charge may be the outcome. For example, a common practice in some courts of limited jurisdiction is a reduction of a DUI charge to a non-DUI “prior offense,” as defined in RCW 46.61.5055(14)(a). *See e.g.*, Kitsap District & Municipal Court Plea Negotiations Manual at 70-71 (2009 Ed)(available on-line at <http://www.kitsapgov.com/pros/>).

In evaluating whether there has been a violation of the agreement, in *Marino*, the court held that the trial court's role in reviewing a motion to revoke a pretrial diversion agreement is limited to (1) determining whether the prosecutor had proved, by a preponderance of the evidence, that the diversion agreement had been violated; and (2) reviewing the reasonableness of the prosecutor's motion to revoke the diversion agreement. 100 Wn 2d at 725. Or, as succulently phrased by Division I, the prosecution's decision to terminate the agreement must be "not unreasonable." *Kessler*, 75 Wn.App. at 639. The court review of whether the agreement should be revoked is limited; "review of a prosecutor's termination decision should consist of assessing its reasonableness in light of the facts the trial court determines at hearing." *Id.*, 100 Wn.2d at 723. Inherent in this analysis is that the prosecutor's rationale for seeking revocation is entitled to deference. *Id.*, 100 Wn.2d at 726.

Against this two-prong backdrop, the lower courts erred. We take each element in turn.

B. Mr. Roberts Violated the SOC.

As part of the SOC, Mr. Roberts agreed to "have no violations o[f] criminal law." (10/14/2010 Muni.Ct.CP 25). On two separate occasions Mr. Roberts was arrested and charged for Driving While License Suspended Third Degree. Driving on a suspended license is a criminal offense in the State of Washington. RCW 46.20.342. In support of its motion, the City offered the sworn police reports of the arresting officers in the other jurisdictions. (11/09/2010 Muni.Ct.CP 8-14 (City of Fife), 11/09/2010 Muni.Ct.CP 4-7 (Town of Steilacoom)). Both reports amply indicate that the defendant was operating a motor vehicle while his license was in a suspended status. The motion to revoke should have been granted on this basis alone.

Below, the parties indicated that Mr. Roberts was able to have one of these violations reduced to a traffic infraction and Mr. Roberts forfeited bail on the other matter.³ The fact that Mr. Roberts was able to procure a resolution by other than a guilty finding is irrelevant to the determination whether he violated the condition to have no criminal violations of law. *See generally, City of Aberdeen v. Regan*, 170 Wn.2d 103, 239 P.3d 1102 (2010). In the criminal context, the clause “[n]o criminal violations of law” unambiguously restricts a [criminal defendant] from engaging in conduct that is proscribed by the criminal law.” *Id.*, 170 Wn.2d at 113 (citation omitted). Thus, in those situations where a defendant has been charged and this new charge forms the basis of a revocation action, an acquittal or dismissal of this charge poses no barrier to revocation. *Id.*, 170 Wn.2d at 111. This is so because the burden of proof in a diversion termination setting utilizes a lesser burden of proof to assess whether a violation of criminal law occurred.⁴ *Id.*, 170 Wn.2d at 108; *Marino*, 100 Wn.2d at 725. Moreover, had the City learned of Mr. Roberts’ transgressions earlier, there would have been no impediment to resolving the Lakewood revocation action before he resolved his other criminal matters. *See e.g., State v. Cyganowski*, 21 Wn. App. 119, 121, 584 P.2d 426 (1978)(no constitutional requirement that a trial be held prior to a

³ In certain circumstances, a court of limited jurisdiction may direct the forfeiture of bail as a final resolution in a criminal case. CrRLJ 3.2 (o)(3). The forfeiture of bail is not an admission of wrongdoing, “but a convenient method of concluding the criminal action, convenient both to the person charged and to the administrators of traffic law enforcement.” *Reynolds v. Donoho*, 39 Wn.2d 451, 456, 236 P.2d 552 (1951). We understand that this rule is set to be rescinded effective July 2012.

⁴ Of course, had Mr. Roberts been convicted of these other offenses, he would be collaterally estopped from arguing otherwise. And an appeal of those other convictions would not bar a prosecutor from seeking revocation. *See e.g., State v. Kuhn*, 74 Wn. App. 787, 792, 875 P.2d 1225 (1994)(noting in deferred prosecution context, awaiting outcome of appellate review does little to protect the public from the risks presented by a criminal defendant who continues to violate treatment program).

revocation hearing on the same acts; even if revocation hearing delayed, an acquittal would not prevent a revocation of probation due to the differing standards of proof).

Although the municipal court did not make a formal determination whether Mr. Roberts engaged in continuing criminal misconduct, a remand on this point is unnecessary. Before the municipal court, Mr. Roberts did not contest the fact that he violated the law. Instead, his attorney explained that there were mitigating factors, “and the driving issue, as I’m sure the Court can understand that its, you know, very hard for someone to pull themselves back together and and pay all their fines and he’s really done a tremendous job in light of his substantial history from five years ago.” (Muni.Ct.VRP 3). Dispositive of this issue, however, is that in his RALJ brief, Mr. Roberts conceded that the “police reports submitted by the City would have established by a preponderance of the evidence that the defendant drove while his license was suspended in the third degree.” (CP 18). This concession necessarily resolves whether Mr. Roberts “ha[d] no violations o[f] criminal law,” and establishes by a preponderance of the evidence that he violated the agreement.

The first prong of the *Marino* test has been satisfied.

C. The City’s Decision to Seek Revocation is “Not Unreasonable.”

The second part of the *Marino* test requires, “that the court [is] to review the prosecutor’s actions to terminate based on a reasonableness standard.” *State v. Cassill-Skilton*, 122 Wn. App. 652, 657, 94 P.3d 407 (2004). In *Kessler*, the court held that the trial court must defer to the prosecutor’s discretion if it finds that the prosecutor’s decision to move to revoke the pretrial diversion agreement was “not unreasonable,” even if

the court otherwise disagreed with the prosecutor's decision. 75 Wn. App. at 639. As *Kessler* explains,

Our review is similarly premised upon the recognition that diversion agreements are entered into and supervised by the prosecutor, as distinct from plea agreements, which are under the direct supervisory control of the court. The principle of separation of powers requires from the appellate court, as well as from the trial court, a degree of deference to the prosecutor's reasons for termination.

75 Wn. App. at 639.

Reversal is warranted on two interrelated grounds.

First, the lower courts did not apply appropriate deference to the prosecutor's decision to revoke for Mr. Roberts violations of the law. Although not expressly stated by the municipal court, implicit in its decision is that there was some court-controlled discretion over the matter. (Muni.Ct.VRP 6) ("counsel and the defendant should be aware that that's an unusual act for this Court because its Stipulated Orders of Continuance are routinely revoked whenever there is an arguable violation. I'm not going to do that." (Emphasis Added)). The Superior Court's decision is clearer. The Superior Court expressly reasoned that the decision to revoke was with the discretion of the municipal court and the Superior Court "cannot find that the [municipal court] abused [its] discretion when [it] denied the City's motion to revoke." (CP 41-42).

The problem with this analysis is that the municipal court had no discretion to exercise. Under *Marino*, the appropriate focus is on the exercise of prosecutorial discretion,

A review for reasonableness requires the trial court to ascertain that facts exist that support a prosecutor's termination decision. Reviewing for a factual basis gives deference to a historically prosecutorial function without depriving an accused of independent judicial review of the

evidence. But as we have noted, practical considerations limit the court's role. The court does not ordinarily determine what further action the prosecutor will take in prosecuting the case. We recognize that following probation violation, it is the court which decides the probationer's disposition. We find, however, that critical distinctions between probation revocation and diversion termination require a somewhat different role for the court in these two situations.

100 Wn.2d at 726.

Recognizing that an appellate court may affirm on any basis in the record, to defend the municipal court's position on RALJ appeal, Mr. Roberts attempted to cast his claim as one of indigency. (CP 19). A preemptive response is necessary to the anticipated resurrection of this argument before this Court. Washington case law provides only one hypothetical example where a decision to revoke would be unreasonable, a prosecutor's decision to terminate for nonpayment of court obligations and treatment will not be upheld where the underlying problem is financial hardship and inability to pay. *Kessler*, 75 Wn.App. at 640 (citing, *United States v. Snead*, 822 F. Supp. 885, 888 (D.Conn. 1993)). Viewing the reasonableness of the exercise of prosecutorial discretion as a spectrum, this example presents one extreme.

The commission of criminal acts presents the other end of the spectrum where revocation should be deemed "not unreasonable," as a matter of law. During the pendency of the diversion agreement, Mr. Roberts twice elected to operate a motor vehicle on a suspended license in violation of the criminal laws of this state. The continued commission of criminal acts while under a diversion agreement is a more-than-suitable basis for revocation. A prosecutor may require strict compliance with a diversion agreement "in order to safeguard the public's interest in seeing

criminals punished for their antisocial behavior.” *United States v. Hicks*, 693 F.2d 32, 34-35 (5th Cir. 1982). Seeking revocation of a pretrial diversion agreement because a defendant elects to continue to reoffend and engage in ongoing criminal misbehavior, regardless of the label affixed to the offense is “not unreasonable.” *Kessler*, 75 Wn.App. at 639. Indeed, *Kessler* inferentially suggests that where revocation is sought for criminal misconduct, revocation is not unreasonable. 75 Wn.App. at 641 (“Because *Kessler*'s violations were not criminal in nature, the trial court perceived them as collateral to the primary objective of diversion.”).

In a circumstance where a criminal defendant is able to avoid a conviction via a diversion agreement, revocation of the division agreement should be fully expected where the defendant elects to reoffend. *See e.g.*, Kitsap District & Municipal Court Plea Negotiations Manual, *supra* at p. 11 (noting, “zero tolerance,” policy for “subsequent criminal law violations for defendants on actively on [deferred prosecution] or [Pretrial Diversion Agreements]”).

Before the municipal court, Mr. Roberts (through counsel) claimed financial difficulty meeting his various obligations and his impoverished status should be an excuse for his misconduct. But as *Kessler* also points out, a defendant’s willful conduct resulting from their deliberate choices may provide suitable grounds for revocation. 75 Wn. App. at 640. But unlike the *Kessler* example, the City did not seek to revoke the agreement because Mr. Roberts may have been indigent and unable to repay his other obligations and become relicensed. The City sought to revoke the agreement because he engaged in conduct which the law expressly prohibited and criminalized.

More importantly, and serving as the second basis why the courts below erred, the municipal court’s stated reasons are not well-founded.

The municipal court's explanation as to why it denied the motion is fairly brief. The municipal court explained that the primary reason why it was denying the motion was that "because counsel represented that she has close enough contact with Mr. Roberts and that he's been a good enough client that he's reporting to her on a regular basis ..." (Muni.Ct.VRP. 6).

Under *Marino*, where a trial court grants the motion to revoke the diversion agreement:

[T]he trial court needs to clearly state the evidence upon which the court relied. The statement may be made orally or in writing. The accused will be afforded full protection of his bargain only if factual disputes are resolved and review of the prosecutor's discretion is based on the evidence.

100 Wn.2d at 727.

As a corollary, where the motion to revoke is denied, the trial court should similarly be required to state its reasoning, mindful of the deferential role afforded to the prosecutor in supervising the agreement, to ensure a meaningful record for appellate review.⁵ The municipal court's explanation is wholly unrelated as to why revocation was sought.

The City's motion to revoke should have been granted. The lower courts improperly focused on the municipal court's perceived discretion in excusing Mr. Roberts' violations of the laws of this state and denying the City's request to revoke the SOC. Had the *Marino* framework been followed, the motion to revoke should have been granted.

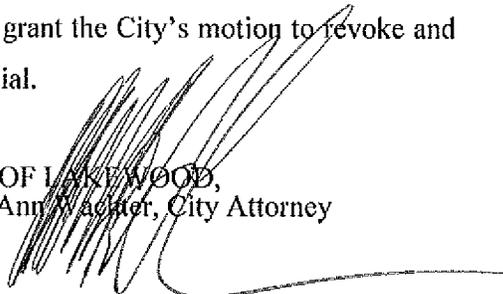
⁵ Here, because the municipal court dismissed the case, the City was entitled to seek direct review under RALJ 2.2(c)(1). If a prosecutor would still be required to supervise the offender via diversion, we assume for the purpose of discussion that the decision would be reviewable via writ of review and the trial court's analysis would necessarily frame under which one of the three prongs the writ could be sought. *City of Seattle v. Holijield*, 170 Wn.2d 230, 244-245, 240 P.3d 1162 (2010).

CONCLUSION

For the foregoing reasons, the City of Lakewood requests that this Court reverse the decisions below and remand this case to the Lakewood Municipal Court with instruction to grant the City's motion to revoke and proceed to a stipulated facts bench trial.

DATED: March 19, 2012.

CITY OF LAKEWOOD,
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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Petitioner's Brief on:

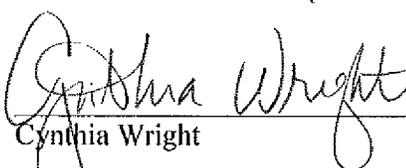
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The undersigned hereby declares, under penalty of perjury, that the foregoing statements are true and correct.

Executed at Lakewood, Washington this 19th day of March, 2012.


Cynthia Wright

LAKEWOOD CITY ATTORNEY

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