

No. 42918-7-II

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

---

CITY OF LAKEWOOD,

Petitioner,

Vs.

ROBERTS, AARON W,

Respondent.

---

**PETITIONER'S REPLY BRIEF**

---

Matthew S. Kaser, WSBA # 32239  
CITY OF LAKEWOOD  
6000 Main Street  
Lakewood, WA 98499-5027  
Telephone: (253) 589-2489  
Facsimile: (253) 589-3774  
*Attorney for Petitioner,  
City of Lakewood*

**TABLE OF AUTHORITIES**

**Cases**

*City of Aberdeen v. Regan*, 170 Wn.2d 103, 239 P.3d 1102 (2010)..... 3  
*State v. Kessler*, 75 Wn. App. 634, 879 P.2d 333 (1994) ..... 1, 2, 4  
*State v. Marino*, 100 Wn.2d 719, 674 P.2d 171 (1984) ..... 1  
*State v. Yates*, 161 Wn.2d 714, 168 P.3d 359 (2007) ..... 3  
*United States v. Hicks*, 693 F.2d 32, (5th Cir. 1982) ..... 3

**Statutes**

RCW 9.94A.411..... 4

**Other Authorities**

Royce Ferguson, 13 Wash. Practice: CRIMINAL PRACTICE AND  
PROCEDURE, § 3504 (2004)..... 3

## **I. REPLY**

Properly applying the holdings of *State v. Marino*, 100 Wn.2d 719, 674 P.2d 171 (1984) and *State v. Kessler*, 75 Wn. App. 634, 639, 879 P.2d 333 (1994) -- at a minimum -- the City of Lakewood is entitled to a new hearing as to the correct application of the two-part test embodied in these cases. The City, however, asks this Court to go a step further. This Court should hold that the City's motion to revoke the diversion agreement in question should have been revoked, not because of any claimed personal hardships, but instead, Mr. Roberts continued to engage in violations of the criminal law. Where proven criminal law violations are alleged as a basis to revoke a pretrial diversion agreement, such allegations should be "not unreasonable," as a matter of law. *Kessler*, 75 Wn.App. at 639. Thus, a remand with instructions to grant the motion to revoke should be the remedy.

Instead of addressing this legal framework, Mr. Roberts asks this Court to affirm the decisions below, based on what he terms to be the "implication of the trial court's oral ruling," that the City did not satisfy the "not unreasonable," standard articulated in *Kessler*. (*Brief of Respondent* at p. 7). In *Marino*, the Supreme Court was clear:

[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 (Emphasis Added).

The municipal court did not "clearly state," a reasonable basis for its decision. *Id.* The municipal court's exclusive basis for denying the motion was, "counsel[']s represent[ion] 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). This decision is also not supported by any "evidence," as *Marino* requires. Even if the arguments of Mr. Roberts could be claimed to be supported by evidence, the decision stems from a flawed understanding of diversion agreements.

The evaluation of whether a pretrial diversion agreement should be revoked is viewed, not against the backdrop of whether the *trial court* had discretion and properly utilized it, as the superior court expressly articulated. (CP 41-42). Rather, owing to separation of powers concerns, the proper focus of the inquiry is on the *prosecutor's* exercise of discretion. *Kessler*, 75 Wn. App. 639. The municipal court's stated basis for denying the motion to revoke failed to address these reasons. This explanation did not address whether Mr. Robert's violated the SOC (although for the first time on RALJ appeal, he conceded he did). It also does not account for the prosecutorial deference which *Kessler* expressly held should be afforded a prosecutor's decision. Hence, at a minimum, the City is entitled to reversal of the decisions below for a new hearing.

For the benefit of those other jurisdictions which use similar sorts of agreements, this Court should go a step further, and hold that under *Kessler*, the revocation of a diversion agreement based on a defendant's commission of new criminal acts is "not unreasonable," as a matter of law. The analysis pertaining to the reasonableness, owing to separation of power's concerns, does not ask whether the Court agrees with the prosecutor's decision to seek revocation. *Id.* Rather, it asks whether the breach was "material" or minor. *Id.*

The centerpiece of any diversion agreement is the defendant's promise not to engage in new criminal misconduct. As stated by one commentator, "the essential diversion program format is to give

participating defendants a true second chance to accomplish rehabilitation or to show otherwise that criminal conduct is not likely to occur in the future[.]” Royce Ferguson, 13 Wash. Practice: CRIMINAL PRACTICE AND PROCEDURE, § 3504, at 38 (3rd Ed. 2004). A defendant, who is afforded this “second chance,” when they elect to reoffend, violates this cornerstone of any diversion agreement and the decision to seek revocation is not “unreasonable.” To hold otherwise, is to allow such defendants to have a “third chance,” or in Mr. Roberts’ case, a “fourth chance,” as they continue to violate the criminal law. A prosecutor “may properly require strict compliance with the diversion conditions.” *United States v. Hicks*, 693 F.2d 32, 34 (5th Cir. 1982).

Mr. Roberts notes that the criminal misconduct forming the basis of the motion was resolved in the other courts without a guilty finding. As the Supreme Court has already observed, how the charge forming the basis of a revocation action is resolved is irrelevant. *City of Aberdeen v. Regan*, 170 Wn.2d 103, 239 P.3d 1102 (2010)(discussing probation revocation). What is relevant is whether the underlining misconduct establishes a violation of the criminal law. *Id.*

Nor is it availing that the prosecutors in the other forums decided to resolve their cases without a guilty finding. A prosecutor in one jurisdiction cannot, absent extraordinary circumstances, limit the discretion or the decision-making authority of a prosecutor in another jurisdiction. *See generally, State v. Yates*, 161 Wn.2d 714, 734-741, 168 P.3d 359 (2007)(Pierce County Prosecuting Attorney not barred from seeking death penalty based on negotiations by the Spokane County Prosecuting Attorney). Thus, it is immaterial how the prosecutors in those other jurisdictions opted to resolve Mr. Roberts’ matters in evaluating whether the Lakewood diversion agreement should be revoked.

Moreover, properly applying the requisite prosecutorial discretion necessarily entails that the interests of one prosecutor's office may differ than that of another prosecutor's office; each prosecutor must make an independent determination based on their own charging standards and availability of resources whether to pursue those matters. *See e.g.*, RCW 9.94A.411. In the circumstance of the City of Lakewood, Mr. Roberts had the opportunity to avoid a criminal conviction to two charges of Malicious Mischief in the Third Degree, provided he not violate the law. Instead, he chose not to do so and opted to twice engage in criminal misbehavior.

Mr. Roberts also argues that the proper analysis also entails an examination surrounding the commission of the new criminal acts or the relationship to the crime on which diversion have been entered-into. (*Brief of Respondent* at p. 10). However, this request unnecessarily intrudes on the discretion afforded to the prosecutor on separation of powers grounds. *Kessler*, 75 Wn. App. 639. Under Mr. Roberts' approach, trial courts would now be in the position of determining which crimes merit revocation of diversion agreements and which ones do not. Taken to the extreme, trial courts would also be in the untenable position of being asked to relitigate cases which have resulted in a conviction to determine if the conviction was "just" or not.

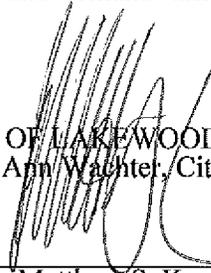
Where a defendant elects to reoffend, revocation of a diversion agreement should be expected. At a minimum, because the courts below failed to properly apply the holdings of *Marino* and its progeny in evaluating the propriety of this revocation, reversal of the decisions below for a new hearing is warranted. The better approach under *Marino*, *Kessler* and its progeny is a bright line rule: the commission of a new criminal offense while on a pretrial diversion will, as a matter of law, support a prosecutor's decision to revoke the diversion agreement.

**CONCLUSION**

This Court should reverse and remand this matter back to the Lakewood Municipal Court.

DATED: May 31, 2012.

CITY OF LAKEWOOD,  
Heidi Ann Wachtel, City Attorney

By:   
Matthew S. Kaser, WSBA #32239  
Assistant City Attorney

**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing on:

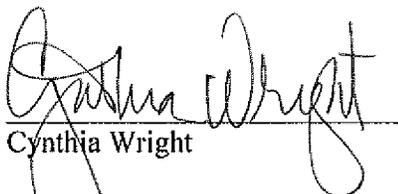
Andrea L Beall  
655 W Smith St Ste 210  
Kent, WA 98032-4477

By the following indicated method:

- \* Deposit into the public defender box at Lakewood City Hall

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

Executed at Lakewood, Washington this \_\_\_ day of May, 2012.

  
Cynthia Wright

# LAKEWOOD CITY ATTORNEY

**May 31, 2012 - 3:31 PM**

## Transmittal Letter

Document Uploaded: 429187-Reply Brief.pdf

Case Name: City of Lakewood v Aaron Roberts

Court of Appeals Case Number: 42918-7

**Is this a Personal Restraint Petition?**  Yes  No

### The document being Filed is:

- Designation of Clerk's Papers  Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: \_\_\_\_
- Answer/Reply to Motion: \_\_\_\_
- Brief: Reply
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_  
Hearing Date(s): \_\_\_\_\_
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Cynthia L Wright - Email: [cwright@cityoflakewood.us](mailto:cwright@cityoflakewood.us)

A copy of this document has been emailed to the following addresses:

[mkaser@cityoflakewood.us](mailto:mkaser@cityoflakewood.us)

[andrea@sbmhlaw.com](mailto:andrea@sbmhlaw.com)