

No. 47217-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

CITY OF TACOMA, Respondent,

v.

JASON DEAN SMITH, Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Thomas Larkin
No. 14-1-03631-2

**BRIEF OF APPELLANT
JASON DEAN SMITH**

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I. ASSIGNMENTS OF ERROR

1. The superior court erred by affirming Mr. Smith's sentence, finding that the sentencing court's refusal to impose sanctions for law abiding behavior violations for over ten months did not violate Mr. Smith's right to a speedy sentencing.
2. The superior court erred by finding that the sentencing court did not abuse its discretion in ordering an alcohol and drug evaluation.
3. The superior court erred by finding that the sentencing court did not violate Mr. Smith's due process rights by setting a review hearing on a date that the court knew that Mr. Smith would be at the Department of Corrections (DOC) and could not appear.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does the right to speedy sentencing apply to imposition of a previously suspended sentence for violation of law abiding behavior?
2. May a sentencing court delay sentencing for the sole purpose of manipulating the order of sentencing to ensure that it has the authority to run its sentence consecutively to

another pending sentence?

3. Does a court's refusal to impose a sentence for ten months, over the defendant's objection, for the sole purpose of having the ability to run its sentence consecutive to a pending matter, violate a defendant's right to speedy sentencing?
4. Does a municipal court have authority to order an alcohol and drug evaluation when there are no allegations of alcohol or drugs in the case before it when there is a subsequent conviction for a drug related offense?
5. Is it a violation of due process for a court to set a review hearing to see the status of an alcohol and drug evaluation when the court knows that the defendant will be serving a sentence at the Department of Corrections (DOC) and will be unable to appear?

III. STATEMENT OF THE CASE

On March 5, 2012, Mr. Smith was found guilty of one count of domestic violence violation of a no-contact order and sentenced to 365 days in jail with 341 days suspended for five years on various conditions. (CP 4-5).

On August 16, 2013, a violation hearing was held because Mr.

Smith had pending law abiding behavior violations, including Pierce County Superior Court cause number 13-1-02843-5. (CP 7). The hearing was set over. (CP 7). Mr. Smith was held on \$5,000 bail on this case. (CP 7).

On September 17, 2013, Mr. Smith had been found guilty on other charges that constituted law abiding behavior violations, but the felony charge was still pending. (CP 7). The hearing was continued at Mr. Smith's request. (CP 7).

On October 24, 2013, Mr. Smith stipulated to the court reviewing the probable cause statement in superior court as a basis for finding a law abiding behavior violation and asked to be sanctioned. (CP 36). The court found that the probable cause statement was admissible; however, the court refused to sanction Mr. Smith. (CP 37). The court stated that "it's well known to this Court that . . . should a sanction be imposed and defendants thereafter appear in superior court on a plea that this Court's sentence is not disclosed, therefore depriving the superior court of its discretion." (CP 37). The court continued:

And it's well known to this Court oftentimes that a sentence imposed in this court is not disclosed to the superior court in consideration of a sentence. And your department - and I'm not saying you in particular - has specifically argued before this Court that a defendant who had served time at DOC where superior court did not specifically authorize concurrent sentence has thereby

come by and argued that that was intended by purpose, and that quite frankly, Mr. Goodwin, has made the argument that we abuse our discretion.

(CP 39).

On November 7, 2013, Mr. Smith again requested that he be sanctioned and defense counsel suggested that they could file a declaration in superior court to advise that Mr. Smith had been sanctioned in Tacoma Municipal Court. (CP 41-42). Defense counsel also argued that refusing to sanction Mr. Smith until the superior court matter was resolved was prejudicial, especially given that Mr. Smith was being held on this matter.

(CP 43).

The court denied the motion. (CP 45-47).

[M]any times, uh – and you’re well aware of it – we’ve seen innumerable examples where this court has taken action, sentenced somebody, uh, and superior court subsequently sentenced them on a, uh, a subsequent crime. The person is sent to the Department of Corrections, our sentence not served, and the argument made after the fact that the superior court must have intended they run consecutive.

(CP 45-46). “I’m setting over because the Court will exercise its discretion.” (CP 47).

Mr. Smith appealed. While this matter was on appeal, Mr. Smith requested that the court impose sanctions on February 18, 2014, March 18, 2014, and on April 14, 2014. (CP 9-10). The court denied each request.

(CP 9-10).

On April 28, 2014, the appeal was decided, finding that Mr. Smith's right to a speedy sentencing had not been violated. (CP 10, 52-53).

On April 28, 2014, May 9, 2014, and June 13, 2014, Mr. Smith asked the court to address the law abiding behavior violations and impose sanctions. (CP 10-11). The court denied each request. (CP 10-11).

Mr. Smith filed a motion and argued for the court to impose sanctions. (CP 12). The court took the matter under advisement, and then denied the motion on August 22, 2014. (CP 12). The court stated that it was waiting to impose sanctions to determine whether to order an alcohol and drug evaluation, given the nature of the charges in superior court. (CP 28-29). At the time, it had been almost ten months since Mr. Smith stipulated to the violation and first requested the court impose sanctions.

Mr. Smith filed a timely appeal. (CP 13). Subsequent to the appeal being filed, Mr. Smith was sentenced to 60 months in superior court and on September 15, 2014 the sentencing court in this matter sentenced Mr. Smith to an additional 90 days, consecutive, to be served in the Pierce County Jail after Mr. Smith's release from the Department of Corrections (DOC). (CP 12-13, 54). The sentencing court also ordered an alcohol and drug assessment and set a review hearing on December 12,

2014, when Mr. Smith would be in custody at DOC, to review the status of the assessment. (CP 13). Defense counsel objected. (CP 13).

On January 16, 2015, Pierce County superior court affirmed Mr. Smith's sentence, finding that Mr. Smith was not denied his right to speedy sentencing, the trial court did not abuse its discretion by ordering an alcohol and drug evaluation, and Mr. Smith was not denied due process when the court set a review hearing when he would be in prison and unable to attend. (CP 55-56).

On February 13, 2015, Mr. Smith filed a Notice of Intent to Seek Discretionary Review. (CP 57-60). This Court granted review on May 7, 2015. This case is before this Court on appeal.

I. ARGUMENT

1. The Constitutional Right to a Speedy Sentencing Applies to Imposition of a Suspended Sentence After a Probation Violation.

A defendant has a constitutional right to a speedy sentencing under the U.S. Constitution and the Washington State Constitution. U.S. CONST. VI amend.; WASH. CONST. art. I, section 22; *see also Pollard v. United States*, 352 U.S. 354, 361, 1 L.Ed.2d 393, 77 S.Ct. 481 (1957); *State v. Ellis*, 76 Wn. App. 391, 394, 884 P.2d 1360 (1994).

Under the plain language of the statute, the sentencing court suspended a portion of Mr. Smith's sentence on conditions of probation;

and later, after Mr. Smith violated the terms of the suspended sentence, the court had the authority to sentence him to the balance of jail.

After a conviction, the court may impose sentence *by suspending all or a portion of the defendant's sentence* or by deferring the sentence of the defendant and may place the defendant on probation

RCW 3.66.067 (emphasis added).

For a period not to exceed five years after imposition of sentence for a defendant sentenced for a domestic violence offense . . . , the court has continuing jurisdiction and authority *to suspend or defer the execution of all or any part of its sentence*

RCW 3.66.068 (emphasis added).

Deferral of sentence and suspension of execution of sentence may be revoked if the defendant violates or fails to carry out any of the conditions of the deferral or suspension. Upon the revocation of the deferral or suspension, *the court may impose the sentence previously suspended or any unexecuted portion thereof*. In no case shall the court impose a sentence greater than the original sentence, with credit given for time served and money paid on fine and costs.

RCW 3.66.069 (emphasis added). Based on the plain language of the statute, it is clear that imposing a sentence for a probation violation is “sentencing.” Therefore, Mr. Smith had a right to a speedy sentencing. Furthermore, speedy sentencing should apply to probation violations, in addition to original sentences, because the same concerns regarding prejudice may apply when a court improperly delays imposing a sentence,

whether it be following conviction or following a probation violation.

Undersigned counsel could not find any case law directly on point. However, there is some indication that a defendant has a right to have a probation violation sentence imposed within a reasonable time. The United States Supreme Court held that unreasonable and prejudicial delays in parole revocation hearings violate due process. In *Morrissey*, the Supreme Court stated that a “revocation hearing must be tendered within a reasonable time after the parolee is taken into custody” *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). In California, defendants have a right to a speedy sentencing for revocations of suspended sentences by statute. *See People v. Wagner*, 201 P.3d 1168 (Cali. 2009). In part, the California statute is in place to assist in law abiding behavior sanctions being imposed concurrently with new prison sentences. *See id.* at 1177. Some courts have held that speedy sentencing does not apply to sentencing following probation revocation; however, any delay must not be unreasonable. *See, e.g., Davila v. State*, 815 P.2d 848, 849 (Wyo. 1991); *Kahlsdorf v. State*, 823 P.2d 1184, 1195 (Wyo. 1991).

For all of the above reasons, this court should find the right to speedy sentencing applies to the imposition of a previously suspended sentence after a probation violation.

2. The Sentencing Court's Refusal to Impose Sanctions for a Law Abiding Behavior Violation for Over Ten Months Violated Mr. Smith's Right to a Speedy Sentencing.

A purposeful or oppressive delay in sentencing violates the Sixth Amendment. *Pollard*, 352 U.S. at 361. To determine whether a delay is purposeful or oppressive, the court weighs four factors: “(1) length of the delay; (2) reason for the delay; (3) the defendant's assertion of his or her right; and (4) the extent of prejudice to the defendant.” *State v. Johnson*, 100 Wn.2d 607, 629, 674 P.2d 145 (1983). Failure to impose a speedy sentence without a request for continuance or good cause is error. *State v. Eugene W.*, 41 Wn. App. 758, 760-1, 706 P.2d 235 (1985).

In *Edwards*, the sentencing court erred by refusing to sentence the defendant and instead committing him to a sexual psychopathy program without sentencing him. *State v. Edwards*, 93 Wn.2d 162, 163-6, 606 P.2d 1224 (1980). Later, Mr. Edwards escaped and then was sentenced on the original charges to two life sentences. *Id.* at 164. The court found that if Mr. Edwards would have been sentenced timely, he would not have been sentenced so harshly; and therefore, he was prejudiced by the delay. *Id.* at 167-8. The court found that Mr. Edwards requested remedy of being sentenced under the circumstances at the time he requested to be sentenced was appropriate. *Id.* at 169.

In *Ellis*, the court of appeals affirmed the dismissal of the charges

where sentencing was delayed for two years due to errors by the court and prosecutor, where there had been no requests to continue the sentencing and no good cause for the delay. *Ellis*, 76 Wn. App. at 394.

In this case, the sentencing court repeatedly continued Mr. Smith's sentencing over his objections. Mr. Smith repeatedly requested that the court find a violation and impose whatever sanctions the court found appropriate. Mr. Smith never requested a continuance after he stipulated to violations on October 24, 2013. There was never any good cause reason given for the continuances. The delay in sentencing was clearly purposeful and oppressive.

a. *Length of Delay.*

The court continued Mr. Smith's sentencing from the time he stipulated to the violations on October 24, 2013 until September 15, 2014. Mr. Smith previously appealed after a two month delay and that appeal was denied. At the time this appeal was filed, the delay had been almost ten months. By the time the sentencing court in this matter imposed sanctions, the total delay was almost eleven months.

b. *Reason for Delay.*

There was no legitimate or good cause reason for the delay. Instead, it appears that the court was trying to ensure that it had the power to sentence Mr. Smith consecutively to superior court. Deliberately

delaying or manipulating the order of sentences in order to ensure that the court sentences second and has the power to impose a consecutive sentence is improper. *See State v. Mireles*, 73 Wn. App. 605, 616-17, 871 P.2d 162 (1994) (court affirms consecutive sentence because “there is no evidence the sentencing court deliberately delayed the trial or otherwise manipulated the sequence of trials” in order to sentence the defendant last).

There have been several cases where this sentencing court’s sentences have been reversed for attempting to run sentences consecutive to a pending superior court matter or re-imposing a sentence after a defendant has served their time and been released by DOC. *City of Tacoma v. Blocker*, 11-1-03321-1 (2011, Dept. 9) (sentence reversed where City conceded sentencing court did not have authority to run consecutive with pending felony or jurisdiction to re-impose sentence after release from DOC); *City of Tacoma v. Gillespie*, 11-1-04473-6 (2011) (sentence reversed where City conceded sentencing court did not have authority to run sentence consecutive with pending felony or jurisdiction to re-impose sentence after release from DOC); *City of Tacoma v. Clemmons*, 12-1-00201-2 (2012, Dept. 22) (sentence reversed where City conceded that sentencing court did not have jurisdiction to re-impose sentence after release from DOC); *City of Tacoma v. Branch*, 12-1-01064-

3 (2012, Dept. 17) (sentence reversed where City conceded that sentencing court did not have jurisdiction to re-impose sentence after release from DOC); *City of Tacoma v. Pinson*, 12-1-03500-0 (2012, Dept. 12) (sentence reversed where City conceded that sentencing court did not have authority to run its sentence consecutive with pending felony); *City of Tacoma v. Lowry*, 12-1-01893-8 (2012, Dept. 20) (sentence reversed where sentencing court ran sentence consecutively with pending felony and re-imposed sentence after jurisdiction lapsed and after defendant released from DOC); *City of Tacoma v. Jackson*, 13-1-00329-7 (2013, Dept. 19) (sentence reversed where City conceded that superior court sentence ambiguous regarding concurrent or consecutive with this case, rule of lenity requires concurrent; therefore, sentencing court had no authority to re-impose sentence after release from DOC); *City of Tacoma v. Beckham*, 13-1-00161-8 (2013, Dept. 15) (sentence reversed where sentencing court did not have authority to re-impose sentence after release from DOC); *City of Tacoma v. Smith*, 13-1-00778-1 (2013, Dept. 4) (parties stipulated that court did not have authority to re-impose sentence after release from DOC); *City of Tacoma v. Alma*, 13-1-00777-2 (2013, Dept. 6) (parties stipulated that court did not have authority to re-impose sentence after release from DOC).

After this sentencing court had been appealed and reversed for

attempting to run sentences consecutive to pending superior court matters or re-imposing sentences after release from DOC numerous times, the sentencing court in this case refused to sentence Mr. Smith until *after* superior court had sentenced him. The sentencing court clearly stated that the reason it refused to sentence Mr. Smith was based on the above appeals. It is clear that the sentencing court was manipulating the order of sentencing because as soon as Mr. Smith was sentenced in superior court to 60 months, the sentencing court in this matter imposed 90 days, *consecutive*, ordered an alcohol and drug evaluation, and set a review hearing when Mr. Smith would be at DOC.

Purposefully delaying sentencing in order to be the last sentencing court, with the authority to run the sentences consecutively or concurrently, is improper. The delay was clearly purposeful and oppressive.

c. Defendant's Assertion of His Rights.

Mr. Smith requested to be sentenced and objected to the continuances as stated above.

d. Extent of Prejudice to the Defendant.

Mr. Smith is prejudiced by the untimely sentencing. Mr. Smith was being held on bail on this matter during each of the continuances. Furthermore, the sentencing court imposed its sentence consecutive to

superior court, ordering that Mr. Smith be returned to the Pierce County Jail to serve the 90 days after he completes his DOC sentence. Based on previous cases before this sentencing court, discussed above, it is likely that if the court had imposed its sentence when Mr. Smith stipulated to the violation, Mr. Smith would have been sent to DOC on the superior court matter and then released. In addition, this hold will likely affect Mr. Smith's eligibility for work release and may affect other classifications. Finally, this court set a review hearing that Mr. Smith could not attend, which the court knew would result in a warrant, and which will likely affect Mr. Smith's classification, eligibility for work release, and may affect his release date at DOC.

It is clear that the delay in sentencing Mr. Smith was purposeful and oppressive. For all of the above reasons, this Court should reverse Mr. Smith's sentence.

e. *Remedy.*

As discussed above, when a violation of speedy sentencing occurs, various remedies have been found to be appropriate; from dismissal to imposing a sentence under the circumstances at the time that sentencing should have been imposed. In this case, it is clear that the sentencing court delayed sentencing in order to run its sentence consecutive to the superior court sentence. Therefore, an appropriate remedy would be order

that the sentence in this matter run concurrently with superior court and that the requirement for an alcohol and drug evaluation and the review hearing scheduled be stricken.

3. The Sentencing Court Did Not Have Authority to Order an Alcohol and drug Evaluation When Neither Alcohol Nor Drugs Were Involved in This Case.

Courts of limited jurisdiction may suspend a sentence on conditions that are necessary to make restitution or to prevent the future commission of crimes. See RCW 3.66.068, *State v. Williams*, 97 Wn. App. 257, 262-63, 983 P.2d 687 (1999); *State v. Summers*, 60 Wn.2d 702, 707, 375 P.2d 143 (1962). However, the conditions must have some relation to the underlying charge.

In *Williams*, an 18-year-old defendant pleaded guilty to five misdemeanors. *Williams*, 97 Wn. App. at 259. There was no indication that alcohol or drugs played a role in any of the charges. *Id.* Later, a condition of no use of alcohol or drugs was imposed. *Id.* at 260-61. The court held:

Williams was 18 years old, not old enough to drink legally. Requiring abstinence from alcohol and unlawful drugs was in this particular case merely an extension of the more general probationary requirement to conduct himself in a lawful manner. We hold abstinence and treatment conditions were not an abuse of discretion, even though they did not relate to his crimes.

Id. at 263.

In this case, Mr. Smith was convicted of violation of a no-contact order. At the time of the original sentencing, the court did not require an alcohol and drug assessment and there is no indication in the record that alcohol or drugs played a role in this incident. Although the law abiding behavior violation involved unlawful possession of a controlled substance and unlawful possession of a controlled substance with intent to deliver, there is nothing in the record that indicates that alcohol or drugs were involved in this matter. The superior court could impose conditions regarding abstinence or treatment for alcohol and/or drugs in that case, but there was no basis for the municipal court to impose those conditions on this case. The sentencing court had no authority to order an alcohol and drug evaluation. Therefore, the sentence should be reversed and remanded to strike that condition.

4. Mr. Smith Was Denied Due Process When the Sentencing Court Set a Review Hearing, Knowing That Mr. Smith Would be at DOC and Unable to Attend, Resulting in a Warrant.

It was a violation of due process to order Mr. Smith to appear for a review hearing on a date when the court knows that Mr. Smith will be detained by DOC.

Due process requires that the terms of probation are clear to the defendant. *See United States v. Guagliardo*, 278 F.3d 868, 872 (9th Cir. 2002); *Grayned v. City of Rockford*, 408 U.S. 104, 108–09, 92 S.Ct. 2294,

33 L.Ed.2d 222 (1972) (“we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly”).

While courts have discretion to determine the conditions of probation, the terms must be reasonable. *State v. Langford*, 12 Wn. App. 228, 529 P.2d 839 (1974) (unreasonable to order defendant to disclose names of her sources for drugs as a condition of probation, where doing so could put her in danger). Setting conditions that are impossible to comply with is unreasonable. *See Sweeney v. United States*, 353 F.2d 10 (7th Cir.1965) (condition of alcohol treatment when psychologist testified defendant could not comply was unreasonable and impossible).

In *Chavez-Romero*, Mr. Chavez-Romero was charged with rape of a child. *State v. Chavez Romero*, 170 Wn. App. 568-72, 285 P.3d 195 (2012), *review denied State v. Chavez-Romero*, 176 Wn.2d 1023, 299 P.3d 1171 (2013). The State was unable to proceed on a rape case within the 60-day time for trial because it could not locate its witness. *Id.* The State asked the court to release Mr. Chavez-Romero to increase the time for trial to 90 days. *Id.* Mr. Chavez-Romero objected, notifying the court that he would be detained by immigration (ICE) and miss his next court date. *Id.*

The court released Mr. Chavez-Romero, he was detained by ICE, and he failed to appear for the new trial date. *Id.* The State requested a

warrant. *Id.* at 574. Mr. Chavez-Romero's attorney appeared, notified the court that Mr. Chavez-Romero was detained by ICE and that he was not willfully failing to appear. *Id.* at 575. The court issued a warrant. *Id.* On appeal, *Chavez-Romero* was reversed and remanded for a dismissal. The court of appeals found that Mr. Chavez-Romero "did not willfully fail to appear." *Id.* at 580.

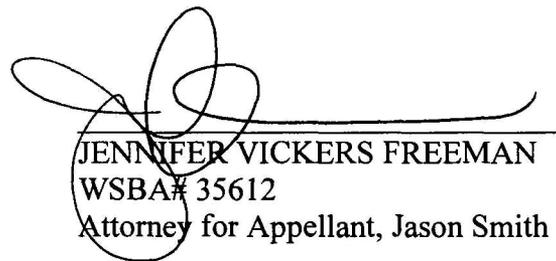
In this case, the sentencing court was aware that Mr. Smith was sentenced to 60 months at DOC at the time the court imposed sentence in this matter. (CDK). Nonetheless, the court set a review hearing for December 12, 2014, to review whether Mr. Smith completed an alcohol and drug evaluation. (CDK). Ordering Mr. Smith to comply with an assessment and appear for a court date that the court knows he could not appear for, is a violation of due process. Mr. Smith could not comply. The court knew that by setting the review hearing while Mr. Smith would be at DOC, a bench warrant would be issued, which would toll jurisdiction and affect Mr. Smith's classification and eligibility for work release at DOC. Therefore, this Court should reverse the sentence and remand to strike the review hearing.

V. CONCLUSION

In conclusion, the sentencing court violated Mr. Smith's right to a speedy sentencing by refusing to impose sanctions for law abiding behavior violations for over ten months in order to run its sentence consecutive to superior court. In addition, the court had no authority to order an alcohol and drug evaluation and denied Mr. Smith due process by setting a review hearing when the court knew that Mr. Smith would be at DOC and unable to appear. For these reasons, this Court should reverse the sentence in this case and remand with instructions to run the sentence concurrent with superior court and to strike the alcohol and drug evaluation and review hearing.

Dated this 23rd day of July, 2015.

Respectfully Submitted,



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Attorney for Appellant, Jason Smith

PIERCE COUNTY DEPARTMENT OF ASSIGNED COUNSEL

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

CITY OF TACOMA,)
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 vs.)
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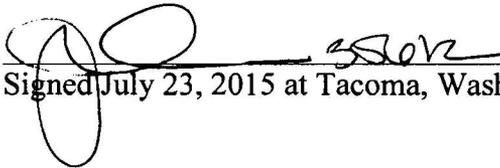
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Signed July 23, 2015 at Tacoma, Washington.

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Is this a Personal Restraint Petition? Yes No

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- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: _____
- Answer/Reply to Motion: _____
- Brief: _____
- 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
- Petition for Review (PRV)
- Other: Certificate of Service

Comments:

No Comments were entered.

Sender Name: Jennifer V Freeman - Email: jfreem2@co.pierce.wa.us

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

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