

NO. 49566-0-II

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

STATE OF WASHINGTON,
Respondent,

v.

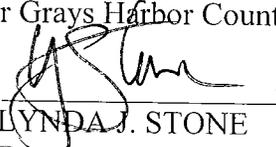
K.A.M.,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. EDWARDS, JUDGE

BRIEF OF RESPONDENT

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ISSUES

Respondent accepts Appellant's Issues as stated.

ASSIGNMENT OF ERRORS

Respondent accepts Appellant's Assignments of Error as stated.

FACTUAL HISTORY

On June 16, 2015, at approximately 11:00 a.m., Lieutenant Staten of the Montesano Police Department was advised of a possible sex offense at 604 W. Spruce Avenue in Montesano, Washington.

Once on scene, Lieutenant Staten made contact with Mindee Moreno who advised her daughter C.L.M. (DOB: 11/20/2003) had disclosed she had been inappropriately touched by her step-brother K.M. (DOB: 12/07/1999). According to Mindee, C.L.M. had come forth after K.M. had been removed from the home. Mindee advised C.L.M. told her K.M. had inappropriately touched her or "Groped" her by touching her on the outside of her clothing in the area of her buttocks. C.L.M. had also disclosed that K.M. had shown her pornographic pictures on a cell phone.

On June 23, 2015, Forensic Interviewer Michael Clark conducted an interview with C.L.M. at the Child Advocacy Center. During the interview C.L.M. disclosed her brother, K.M., had shown her adult pornographic movies while they were living in Aberdeen, Washington.

This address was identified as 904 W. First Street in Aberdeen. C.L.M. disclosed K.M. had “Forced” her to place her mouth on his skin in the area that is covered by his pants. C.L.M. also stated K.M. would inappropriately touch her on her buttocks area.

On July 15, 2015, at approximately 9:00 a.m., C.L.M. underwent a forensic examination at the Sexual Assault Clinic in Olympia, Washington. During the interview, she gave the same account as she had given previously to Forensic Interviewer Clark. However, in this interview she was more detailed and specifically stated on one occasion her brother, K.M. had placed her hand directly on his penis and moved it back and forth in what she described as an up and down motion. C.L.M. was also very specific in regard to another incident where she was “Forced” to place her mouth on K.M.’s penis.

During the interview, C.L.M. was asked if she recalled when this incident occurred, but she was not quite sure. Although C.L.M. could not give a specific date, she did confirm it happened while they were living in Aberdeen at 904 W. First Street, and it happened after the family moved back from California. According to Mindee, the family moved back to Aberdeen, Washington from California in the fall of 2013.

PROCEDURAL HISTORY

Respondent accepts the majority of Appellant's Procedural Statement of the case. However, there are several inaccuracies which need to be corrected. Appellant stated the matter at hand was filed approximately four months after K.M. received the SSODA. Brief of Appellant at 2. However, that was probation violation number one, which alleged K.M. used marijuana and alcohol, committed a crime by driving without a license, and viewed pornography. CP 23-24. K.M. admitted the first two allegations, and per a plea agreement, the State dismissed the third allegation. CP 30.

The matter at hand was filed approximately 10 months after K.M. Received the SSODA. CP 35. Appellant stated the State alleged K.M. had failed to follow recommendations of the SSODA program. Brief of Appellant at 2. Unfortunately, Appellant failed to note page two, which stated K.M. had failed to make adequate progress in his treatment. CP 35. This is in direct violation of the Judgment and Disposition, which states, "If the offender violates any condition of the disposition or **the Court finds that the respondent is failing to make satisfactory progress in treatment**, the Court may revoke the suspension and/or execution of the disposition." CP 14. (emphasis added).

Appellant mainly addressed one hearing held on this matter, made brief mention of one other that was held, and did not note the two other hearings which were held. Brief of Respondent at 2; RP 38-40; RP 41-44; RP 45-114; RP 115-118. At the first hearing, K.M. was given a first appearance, an attorney was assigned to him, and a hearing date was set. RP 38-40. At the second hearing, Appellant requested a two week continuance to conduct an investigation. CP 41. The Court asked for the details of the alleged violations, and the JPC said there were multiple concerns from the treatment provider and probation office in Oregon. CP 42. The JPC stated she had many reports which included, "A lot of minimizing, not taking responsibility, not making any progress in his treatment." *Id.* This packet of reports was clearly given to both attorneys because each questioned the probation officer and treatment provider regarding them at the next hearing. CP 54 – 69, CP 81 – 95.

Appellant made an assertion that the State did not provide any evidence showing K.M. violated the written terms of his SSODA. Brief of Appellant at 3. However, the specific allegation for the revocation was K.M. failed to make adequate progress in treatment. CP 35. The State provided an abundance of evidence regarding the lack of progress in treatment. Exhibit 1, RP 45-114.

Appellant stated he had learned that K.M. would be able to enter residential treatment at Parrott Creek. Brief of Appellant at 3. However, this was based solely on information provided by Appellant's grandmother, and was in direct opposition to Ms. Foley's testimony. RP 115, 117. Ms. Foley, K.M.'s Juvenile Probation Counselor in Washington State, stated she had spoken to the director of Parrott Creek Ranch in Oregon, who said they only take referrals from Oregon Youth Authority so it was not possible for K.M. to be placed there. RP 115.

Finally, Appellant reported the only ruling the Court made regarding this matter was that K.M. was kicked out of treatment for violating the rules. Brief of Appellant 4-5. While that is one finding the Court made, the Court also found K.M. needed a higher level of care than the treatment provider was able to provide, K.M. needed treatment, and K.M. had not made meaningful progress in treatment because he was still victim blaming two years after the incident occurred. CP 112 – 113.

ARGUMENT

1. The Court delineated the evidence it relied upon in making the decision to revoke K.M.'S SSODA.

Because parole and probation revocations are not part of a criminal prosecution, the defendant does not receive the same constitutional rights.

Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967). The Court has held that not all situations which require procedural safeguards require the same kind of procedure. *Morrissey v. Booher*, 408 U.S. 471, 481 (1972), 92 S.Ct. 2593, 33 L.Ed.2d 484.

The Court in *Morrissey* found there are two important stages in the typical process of a parole revocation. *Id.* at 484. The first stage is the arrest of the parolee and preliminary hearing, and the second stage is the revocation hearing. *Id.* at 484-485.

The *Morrissey* Court also held there are minimum requirements of due process, which include (a) written notice of the claimed violations; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses; (e) a neutral and detached hearing body; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. *Id.* at 488-489. It should be noted in *State v. Robinson*, 120 Wash.App. 294, 300, (2004), 85 P.3d 376, the Court found the trial Court's failure to make a written statement of the evidence relied upon and the reasons for its decision is not fatal. The *Robinson* Court further held because the only evidence presented at the defendant's revocation hearing was the evidence

regarding the violations at issue it was possible for the Court to determine what evidence the trial Court relied upon. *Id.* at 301, Const.Amend. XIV.

In the case at hand, the trial Court did not make a written statement, which like *Nelson*, is not fatal. During the main revocation hearing, the Court heard from Liz Burns, the Juvenile Probation Counselor with Clackamas County Juvenile Department in Oregon and Brooke Gateley Meier the therapist in Oregon who had been providing sex offender treatment to K.M. RP 49 – 96.

During that hearing, Ms. Burns stated a meeting was held with K.M. to discuss his lack of progress in treatment. RP 66. She said at that time there was an extensive conversation about K.M. not making any progress in treatment, and gave an example of his thinking errors with his thought processes. *Id.* According to Ms. Burns K.M. was made aware of the concern. *Id.*

Ms. Burns further testified that in the next several months, K.M.'s behavior had not changed. *Id.* at 67. She stated he was showing thinking errors, looking for loop holes in the treatment process, was argumentative about the effectiveness of treatment (such as polygraphs), deflecting from the treatment modalities while he was in treatment, and had a constant sense of victim blaming. *Id.* Appellant questioned Ms. Burns on when

K.M.'s probation would expire, and if he could be in treatment while on probation for another year. *Id.* at 73. Ms. Burns reiterated K.M. was not making progress in treatment and it was the professional recommendation of the treatment provider that K.M. needed a more intensive program. *Id.*

Ms. Gateley Meier testified that K.M. showed minimal insight into his offenses and his inability to take responsibility for what happened for his original offense. *Id.* at 89. Ms. Gateley Meier stated in the time she was working with K.M. she only heard him take responsibility for his offense once. *Id.* at 90. However, she reported K.M. said the reason he wanted to take responsibility for the offense was because he was fearful of returning to Grays Harbor detention. *Id.* at 91. She said other than that K.M.'s attitude regarding the offense was it was the victim's fault, in fact the victim consented. *Id.* Finally, Ms. Gateley Meier opined K.M. was in need of a higher level of care for sex offense specific work. *Id.* at 92.

The Court clearly relied upon the testimony of Ms. Burns and Ms. Gateley Meier. The Court stated, "The treatment provider in Oregon, Ms. Gateley Meier, testified that K.M. currently needs a higher level of care than she is able to provide." *Id.* at 112. The Court also stated, "We all know that nobody makes meaningful progress in this kind of a treatment program while they're still engaging in victim blaming two years after it

happened.” *Id.* at 113. And finally, the Court stated the Appellant could not return to treatment with Ms. Gateley Meier and there were no other treatment facilities or providers that would take K.M. *Id.* at 115-118.

The evidence provided at the revocation hearing had solely to do with the alleged violation so even though the Court did not make a written statement, like *Robinson*, it is possible for this Court to determine what evidence the Trial Court relied upon.

2. The State provided adequate notice to K.M. as to the violation for which it sought to revoke his SSODA.

When a defendant is facing a revocation hearing, the State must provide a written notice of the claimed violations. *Morrissey* at 47, *In Re Blackburn*, 168 Wn.2d 811, 884, 232 P.3d 1091 (2010). In addition to providing notice to the defendant of the violation alleged, the State must also provide the evidence that will be presented. *State v. Dahl*, 139 Wn.2d 678, 685, 990 P.2d 396 (1999).

In *Robinson*, the defendant was subjected to a number of requirements when placed on parole. *Robinson* at 297. The Department of Corrections filed a report alleging the defendant had committed eight violations. *Id.* The State sent two notices to the defendant, one of which listed only two of the eight violations. *Id.* at 298. A revocation hearing

was held, but *Robinson* did not object to the evidence presented or the presumed inappropriate notice. *Id.* Robinson argued on appeal he did not receive proper notice of the alleged violations. *Id.* at 299. In *State v. Nelson*, 103 Wash.2d 760, 697 P.2d 579 (1985), the Court held a defendant could not sit by while his due process rights were violated at a hearing and then allege due process violations on appeal. Therefore, because Robinson did not object to notice at the modification hearing, he waived the notice requirement. *Robinson* at 299-300.

In the case at hand, the State provided appropriate written notice as to the violation alleged. CP 34-35. Appellant is correct that the State claimed K.M. had failed to follow recommendations of the SSODA program, however, Appellant failed to note page two of that notice, which states, “The probation counselor informed the State that the respondent has failed to make adequate progress in his treatment.” CP 35.

Further, at the second hearing on this matter, the evidence the State was to rely on was furnished to K.M. The Court inquired as to the details of the alleged violations, and Ms. Foley, said she had numerous reports from the probation counselor and treatment provider in Oregon which

stated K.M. was doing a lot of minimizing, not taking responsibility, not making any progress in his treatment, and the treatment provider terminated K.M. from the program because he needed more intensive sex offender treatment. RP 42. The matter was then set over and at the third hearing it was evident that K.M. had received the packet of documents Ms. Foley was referring to because he referenced the documents in his opening statement, as well as when he questioned the witnesses. RP 46, 69, 93; Exhibit 1.

At no time during the four hearings on this matter did the Appellant object to the notice he received or the evidence the State intended to use to prove the alleged violation. Per *Nelson* and *Robinson*, because the Appellant failed to object he waived the notice requirement. *Robinson* at 299-300.

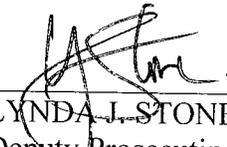
The State provided appropriate written notice to the Appellant as to the violation alleged. The State also provided Appellant with the evidence the State intended to use in the revocation hearing. Finally, the Appellant failed to object to the notice received and to the evidence relied upon, and therefore waived the notice requirement.

CONCLUSION

For the foregoing reasons, the trial court's revocation of K.M.'s SSODA was proper. The Respondent respectfully requests this court affirm the disposition.

DATED this 3 day of May, 2017.

Respectfully Submitted,

By: 
LYNDA J. STONE
Deputy Prosecuting Attorney
WSBA #38749

LJS/ws

GRAYS HARBOR COUNTY PROSECUTOR
May 03, 2017 - 10:03 AM
Transmittal Letter

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Petition for Review (PRV)

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Comments:

I sincerely apologize for using the Appellant's full name in the last brief I submitted.

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