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No. 50522-3-II
Mason County No. 13-1-00292-2

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

STATE OF WASHINGTON,

Respondent,

v.

KYLE THOMAS BELL,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
MASON COUNTY

The Honorable Judges Toni A. Sheldon and
Amber Finlay

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The state failed to give appellant Kyle Bell adequate written notice prior to revoking his Special Sex Offender Sentencing Alternative sentence.

2. The lower court erred in revoking the SSOSA.

3. Appellant assigns error to the following conditions of community custody:

   8. The defendant shall not loiter in nor frequent places where children congregate such as parks, video arcades, and day care facilities or other such places as may be designated by the CCO and/or the state certified sexual deviancy treatment provider;

   . . .

   11. The defendant shall undergo periodic polygraph and/or plethysmograph testing to measure treatment progress and compliance at a frequency determined by his/her treatment provider and/or his/her Community Corrections Officer.

CP 63.

B. QUESTIONS PRESENTED

1. Did the state fail to give adequate written notice that it was seeking to revoke the SSOSA sentence when the petition it filed explicitly did not request revocation?

2. Did the trial court err in revoking the SSOSA based on Bell being released from treatment because the basis for the revocation of his treatment was statements from the Community Corrections Officer (CCO) about him being in contact with a woman and her children, even though the trial court also found that the state had failed to provide even minimally sufficient evidence to prove by a preponderance that Bell had been in such contact with the children?

3. Does condition 8 violate due process as unconstitutionally vague and overbroad by failing to give adequate notice of prohibited conduct or sufficient standards to prevent arbitrary enforcement?

4. Does condition 11 violate due process and the right to be free from unreasonable bodily searches by allowing a community corrections officer to order penile plethsymograph testing as a monitoring tool instead of confining it to reasonable therapeutic purposes?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Kyle T. Bell was charged by first amended information filed in Mason County superior court with rape of a child in the second degree. CP 27-28; RCW 9A.44.076. On January 28, 2014, the Honorable Judge Toni Sheldon accepted Bell's plea of guilty to that charge. CP 35-46; RP 67-68.[1]

At sentencing on March 3, 2014, the Honorable Judge Amber Finlay imposed a Special Sex Offender Sentencing Alternative sentence. CP 49-64; RP 70. Specifics regarding review hearings and proceedings over time are detailed more fully, *infra*. The revocation proceedings from which this appeal is taken began after Mr. Bell was arrested in March of 2017. RP 190-91. On April 26, 2017, the parties appeared for a proceeding in front of Judge Sheldon, after which the judge revoked the SSOSA and imposed the previously stayed sentence, on June 13, 2017. RP 304. Mr. Bell appealed and this pleading follows. See CP 139.

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[1]The verbatim report of proceedings consists of two volumes, chronologically paginated. The proceedings transcribed are as follows:

June 28, July 8, August 5, 12, 13, and 26, September 3 and 9, October 7 and 28, November 4 and December 2, 2013, January 6, 21, 22, 24, 27 and 28, March 3, September 29, October 13, and December 2, 2014, March 17, July 14, November 24 and December 8, 2015, March 15, June 22 and 28, July 12 and 26, August 30, September 13 and October 4, 2016, February 6, March 13, 27 and 30, April 4, 25 and 26, June 5 and June 13, 2017.

2. Relevant facts

a. The plea and sentencing

On January 28, 2014, Judge Sheldon accepted Mr. Bell's plea of guilty to second-degree rape. RP 66-68. In the Statement of Defendant on Plea of Guilty, the following was included:

> 11. The judge has asked me to state what I did in my own words that makes me guilty of this crime. This is my statement: On 6/7/13 in Mason County, WA, I engaged in sexual intercourse with K.A.W. who was at least 12 y but not 14y, not married to me and at least 36 month[s] younger that [sic] I am.

CP 44 (emphasis in original).

Sentencing was held on March 3, 2014, before Judge Finlay. CP 49-64; RP 70. The judge imposed a Special Sex Offender Sentencing Alternative (SSOSA). CP 54-56; RP 95-98. The judgment and sentence ordered a 90-month minimum and life maximum sentence, suspended on condition of eight months confinement and three years of community custody with conditions including regular review hearings. CP 51. Bell was ordered to have no contact with the named victim, K.A.W., for life, and further ordered as "crime related prohibitions" the following in relevant part:

> 1. The defendant shall reside at a location and under living arrangements that have been approved in advance by the CCO, and shall not change such arrangements/location without prior approval;
>
> 2. The defendant shall not possess or consume any mind or mood altering substances, to include the drug alcohol, or any controlled substances, except pursuant to lawfully issued prescriptions;
>
> 3. The defendant shall not go into bars, taverns, lounges, or other places whose primary business is the sale of

liquor;

4. The defendant shall, at his/her own expense, submit to random urinalysis and/or breathalyzer testing at the request of the CCO or treatment provider to verify compliance;

. . .

6. The defendant shall not have contact with minor children under the age of 18 years unless in the presence of a responsible adult who is capable of protecting the child and is aware of the conviction, and contact has been approved in advance by the Community Corrections Officer and the sexual offender's treatment therapist;

. . .

8. The defendant shall not loiter in nor frequent places where children congregate such as parks, video arcades, and day care facilities or other such places as may be designated by the CCO and/or the state certified sexual deviancy treatment provider;

9. The defendant shall immediately upon release enter into and successfully participate in and complete a program offering sexual deviancy treatment through a state certified therapist;

. . .

11. The defendant shall undergo periodic polygraph and/or plethysmograph testing to measure treatment progress and compliance at a frequency determined by his/her treatment provider and/or his/her Community Corrections Officer.

CP 63.

b. Review and other proceedings

In late September of 2014, it appeared there had been a "notice of violation" filed by the Department of Corrections (DOC) Community Corrections Officer (CCO). RP 103. Mr. Bell had been

going to treatment as directed and "working through his issues" without incident. RP 104-105. However, he and his father had purchased a toolbox at a garage sale and discovered that it had a bullet inside it. RP 105-106.

After a Petition was filed indicating that this was a violation of his SSOSA, a hearing was held at which Bell admitted in court to having found the shell and his father taking and disposing of it. RP 108-109. The court found a violation of the SSOSA for Bell's delay in reporting the possession of ammunition to the CCO. RP 112. The state recommended a short sanction of 15 days on work crew because "[o]ther than this issue that came up," Bell was working and had been "pretty compliant with his supervision." RP 112.

On December 2, 2014, at a review hearing, Mr. Bell's positive progress was mentioned and another review date set. RP 116. He was also found compliant and doing well on March 17, 2015, and July 14, 2015. RP 118-22. It was noted that Bell had kept up his employment and with treatment despite significant challenges with his family situation, including his dad being diagnosed with cancer, his uncle dying and another uncle getting sick. RP 121-22. In November of 2015 there was a question because it appeared that Bell had flunked two questions on a polygraph regarding alcohol access or use but there had been no follow up. RP 125-26. No petition or anything similar was filed and subsequent reviews on December 8, 2015, and March 15, 2016, found Bell in compliance. RP 128, 132-35.

In June of 2016, Mr. Bell was arrested on alleged violations,

including having access to children because he was living with a girlfriend who had kids. RP 136-50. Marijuana and alcohol had been found in the residence, although Bell himself said he was not using them. RP 139-41. Mr. Bell moved out and the state ultimately changed its position and asked not to have the court revoke the SSOSA but instead impose a term of 8 months in custody and follow up with continuing the SSOSA upon release. RP 173. The court agreed but made it conditioned upon a polygraph regarding contact with children. RP 178.

The written order modifying the judgment and sentence found that Bell had committed violations of "failure to reside in DOC approved resident and failure to comply with treatment conditions and had contact with minor children." CP 90. The sentence was modified to include the following orders:

> (1) Defendant shall serve eight (8) months in custody[;]
>
> (2) He shall continue in SSOSA Treatment with Dr. Jeff Crinean[;]
>
> (3) He shall start intensive individual treatment to eliminate thinking errors;
>
> (4) Continue in group sessions;
>
> (5) Abstain from all relationships not sanctioned by the provider, group and DOC[;]
>
> (6) Monthly polygraph + court reviews every 6 weeks until changed by treatment provider[;]
>
> (7) He shall follow all DOC + Treatment Requirements[.]

CP 90-91. The court also ordered "Base line for polygraph if has had any contact with children." CP 91.

Review hearings and continuances were held on February 6, March 13 and 27, 2017. RP 183-88. On March 30, however, it was revealed there was a new alleged violation and Mr. Bell had been taken into custody. RP 190-91.

c. The allegations and hearing

On March 31, 2017, the prosecutor filed a pleading titled "PETITION FOR ORDER MODIFYING SENTENCE/REVOKING SENTENCE/CONFINING DEFENDANT." CP 130 (emphasis in original). The state alleged two violations, citing an attached DOC "violation report," dated March 30, 2017. RP 200; CP 130-34. The report listed the"violation(s)" as follows:

> **Violation 1:** Having contact with minors on several occasions, on or after 03/15/17.
>
> **Violation 2:** Failing to complete SSOSA treatment as directed by the Court, on or after 03/29/17.

CP 132.

In the report, the CCO declared that he called the provider, Jeff Crinean, "and informed him of what was going on with Mr. Bell." CP 133. The report went on:

> Jeff Crinean informed me he would have to review his contract with Mr. Bell but he believed this relationship with Lindsey Frazier would put Mr. Bell in violation of his treatment conditions as all of his romantic relationships must be preapproved. Jeff Crinean said he would get back to me once he reviewed everything.
>
> On 03/29/17, I received a call from Jeff Crinean who informed me that Mr. Bell was found in violation of his SSOSA treatment contract and that Mr. Bell was discharged from treatment.

CP 133. The report also alleged that a "specific issue" polygraph

indicated Bell was "found to be deceptive on having contact" with Frazer's kids. CP 133. The writer of the report recommended that the SSOSA "be revoked." CP 134.

The state's Petition, however, asked the court for relief as follows:

> 4. The undersigned petitions the court for an order:
>
> [ ] Modifying sentence.
>
> [ ] Revoking the sexual offender alternative suspended sentence and ordering execution of sentence.
>
> [ ] Confining the defendant pursuant to RCW 9.94A.200(2)(b).
>
> [X] Requiring the defendant to show cause why he should not be punished for noncompliance with sentence.

CP 130.

After continuances were held on April 4 and 25, 2017, a hearing was held on the claims on April 26, 2017, before Judge Sheldon RP 192-93, 199. Aaron Anderson, the community corrections officer in Gig Harbor who had supervised Mr. Bell, testified against Bell at the hearing. RP 201-203. The CCO started supervising Bell when he was first released, some time in 2013. RP 203. Anderson knew that Mr. Bell had previously had a relationship with a woman named Lindsay Frazer and that Frazer had several young kids. RP 204. In fact, Anderson said, that relationship had been the reason for the prior "violation" hearing, when Bell had been living with Frazer and had to move out. RP 204-205.

On cross-examination, however, the officer admitted that part of the reason Bell was terminated from his first treatment provider was lack of funds. RP 214. Anderson also conceded that a lot of the reports of Bell possibly being at Frazer's home came from Frazer's "ex." RP 215.

The CCO did not know the exact age of the children who lived at the home but guessed they were "five to seven." RP 205. He said he "was never able to get a lot of information on that." RP 205.

In mid-March of 2016, Anderson's colleague at work reported that someone had called in to claim that Mr. Bell was living with Ms. Frazer and her kids again, so Anderson decided to check, driving to Frazer's neighborhood in the evening a day or so later. RP 205-206. He drove to where Frazer lived and saw what he thought was Bell's truck parked in a driveway across the street from Frazer's house. RP 206. Anderson got out and approached Bell, asking why he was there when he was not supposed to be around Frazer's kids. RP 206. Anderson was also concerned that Bell was probably not supposed to have a relationship with Frazer unless it was approved through "SSOSA treatment." RP 206.

Anderson conceded at the hearing that a lot of the telephone calls reporting claims that Bell was living with Frazer again were from Frazer's "ex." RP 212-13.

Mr. Bell told Mr. Anderson that Bell was not having contact with Frazer's kids. RP 206. Not believing Bell, Anderson demanded Bell's phone. RP 206. Bell said he did not have his phone on him

and that he needed to go to the bathroom. RP 206. The officer refused Bell's request and decided to pat him down for "weapons" but also to "see if the phone was on him." RP 206. It was. RP 206. Bell expressed surprise and Anderson then looked through the phone, reading text messages on it. RP 206-207.

The community corrections officer took out his own work phone and took photos of what he saw on Bell's phone. RP 208. Anderson recognized a woman in one photo as Frazer, whom he had seen before. RP 208. The text messages depicted included many which discussed how much Bell and Frazier loved each other, a photo of Bell and Frazier in the residence, kissing with no shirts on, and communications from Bell about having made the beds and cleaned up. RP 209-18.

After consulting with his supervisor, Anderson just warned Bell he was not allowed to be around Frazer and to go home. RP 213. The next day, Anderson called Bell's treatment provider and conveyed his suspicions that Mr. Bell was having contact with Frazer's kids. RP 213. Anderson testified that the provider called him later to tell him that he was terminating Bell from treatment. RP 213. Anderson then arrested Bell. RP 213.

Anderson conceded that he did not confirm his concern that Bell was living at Frazer's in March. RP 216. He did not ask to go into the home to see if there was clothing or items there belonging to Bell or indications Bell lived at the home. RP 218. Anderson also spoke with Frazer, who did not say Bell was living there, and

neighbors of Frazer, who likewise did not say anything supporting Anderson's theory. RP 216. Instead, Anderson concluded that the text messages were enough. RP 218.

The CCO had previously gone and visited the trailer in which Bell was living, which was on his father's property. RP 219. In all of those visits since Bell's release, the CCO had found no violations causing him to write anything up. RP 219. Anderson conceded that Bell always showed up for his appointments, and there had been no issues for report days, polygraphs or court dates. RP 220. There were also never any issues with Bell's efforts at employment. RP 221.

Anderson never found any eyewitnesses who saw Bell with Frazer's kids or any others. RP 221. Anderson maintained that he expected Bell to live at the address where he was reporting he was at "every night." RP 221. Anderson said "if you are not at your listed residence, or you're not staying there every night, that puts you in violation." RP 222. He also said, "if you're staying at a girlfriend's house for a night, and you don't inform that to me, that will put you in violation of your supervision." RP 222. There might have been ways for Bell to visit when the children were not there, Frazer said, if it was set up through his treatment provider. RP 223.

The CCO testified that, during January and February of 2017, he drove by Bell's dad's home and tried to do "morning address checks" of Bell at about 6 in the morning, but Bell was not there. RP 297. Anderson remembered confronting Bell and stating concerns that this meant Bell was not actually staying at that home. RP 297.

Bell had responded that he gets up early sometimes. RP 298. Anderson admitted that, at the time, Bell was seeking work. RP 298.

Lindsey Frazer testified on Mr. Bell's behalf. RP 225. She knew Bell in 2005 when he lived in a rental her grandparent's home but they had lost communication until about 2015, when they met up and started dating. RP 226. Ms. Frazer testified about that time, prior to the first violation hearing for Bell, when he was living with her and her children, who were five, four and three years old. RP 227. Frazer had not been "100% aware" that Bell could not be around children at that time, thinking he could have supervised contact and be around them when she was there, too. RP 227-28.

Once the first violation hearing occurred and Frazer had spoken with Anderson, however, Frazer became aware that Bell could not have contact with children at all. RP 228. From that point on, she said, Bell did not have contact with her kids. RP 228-29.

More specifically, Frazer said, from the time Bell was released in November of 2016 to the time of his arrest in March of 2017, Bell was never around her kids. RP 228-29.

There were a "couple times" when Bell wanted to come drop off or borrow tools or things and a few times he had dropped off wood for her. RP 228-29. There was also once when he had dinner at her home. RP 229. Each time, however, the kids were not there. RP 228-29. For example, when she allowed him in to get tools, she said he had 20 minutes total and her neighbors made sure he was out within that time. RP 229. She and the kids were in school at the

time of the tweets about the kids' room, when he had come by and then apparently straightened up and sent her a message that he had done so. RP 229-30.

Ms. Frazer was also firm that Bell did not ever watch Frazer's kids. RP 230. In fact, she had ended the relationship with Bell. RP 231. Frazer was in a custody battle for her kids with her ex, Jacob Clayton. RP 231. Frazer said she still cared for Bell "but with everything going on I'm not going to be around," which she said was because of her ex "trying to take my girls" and the issues with Bell's background. RP 232.

She also discussed the text messages they had sent. RP 232. They communicated their love for each other, she agreed. RP 235. But Frazer and Bell were not dating after his release, despite loving each other, Bell maintained. RP 232. They still "hung out" a little but it was not sexual at all. RP 235.

Melissa Baker, a neighbor of Frazer's, testified on Bell's behalf. RP 247. Baker had kids and would watch Frazer's kids when Bell was scheduled to come over or drop something off or be at Frazer's house. RP 237-39. Baker also saw Bell out in the neighborhood helping neighbors and had helped Baker, too. RP 239-40. After his release from custody, Baker said, she never saw Bell with Frazer's kids and Baker and Frazer were like sisters. RP 240, 246.

Ms. Baker also said that the truck that was in her driveway was that of her father-in-law, not Mr. Bell. RP 240. The trucks were very similar. RP 240. Baker suffered anxiety and depression, as did

Frazer, so they spoke about it. RP 246.

Dean Draeger, another of Ms. Frazer's neighbors, knew Bell as a friend of Frazer's and said Bell was there "awhile back helping and stuff." RP 248. Mr. Bell had helped Draeger out by doing some lawn mowing and things that were pretty difficult for Draeger, who was disabled. RP 249-50. Bell might have been there before that time, helping out, and Drager said Bell was "becoming part of our community." RP 254.

For the most part, Draeger, an accountant, works at home, sitting in his window eight to 10 hours a day. RP 251. Mr. Draeger said there were two times he saw Bell at Frazer's and each time the neighbor was wondering why Frazer "had suddenly packed up the kids and left," after which Bell would show up and unload wood. RP 251-52, 255. Draeger was surprised, actually, when Frazer "all of a sudden" grabbed all the kids up, got them in the van and drove away, thinking "that's odd[.]" RP 255-56. In fact, he wondered if something was wrong. RP 256. He then saw Bell arrive, unload the wood and leave, after which Frazer would return. RP 256.

Mr. Draeger did not think that Bell had been at Frazer's in the early mornings or overnight from about November to the day of his arrest. RP 252. Draeger was working in his window from between about 6 in the morning to 9 or 10 at night, mostly every day. RP 252. Although Draeger was gone about one day a week, the day of the week varied. RP 253. Draeger was sure there was no way to get into Frazer's house for a visitor without Drawer having seen them. RP

253. He said of Bell, "[he] couldn't get anywhere close to Lindsey's without me seeing him - - seeing movement." RP 253. While Draeger freely admitted he was not "staring at her house 12 to 14 hours a day," he explained "anything that's moving out there gets my attention," especially because of her outside lights. RP 253-54.

Draeger was sure there were only two times that Bell came out with a load of wood. RP 254. Bell's father came out a couple of times and brought wood out, too, but it was only twice for Bell. RP 254-55. When he brought the wood out, Draeger said, Bell would unload it outside the house and not go in. RP 254.

Harold Brevik, another neighbor, testified that he was having Bell do work for him on the day that Anderson arrived. RP 259-60. Brevik was there just as Bell was about to go underneath Brevik's trailer to help fix some plumbing. RP 260. They had just gotten back from Home Depot in Bell's truck. RP 260-61. Bell had driven up to pick up Brevik that day and Brevik was clear he did not see Bell have any contact with Frazer's children. RP 261.

Brevik was aware of Bell having been released in November of 2016. RP 261. From November 2016 to the date of the arrest in March, Brevik never saw Bell have any contact with Frazer's kids. RP 262. Indeed, Brevik said, he did not believe Bell was at Frazer's trailer during that time. RP 262. Brevik got up "super early," at 1:30 or 2 in the morning for medical reasons, and usually stood up and leaned in his kitchen because of his back. RP 262-63. From that vantage point, he did not see Bell's vehicle at Frazer's or in the

neighborhood in general at times other than those he mentioned. RP 262-63.

Mr. Brevik said that Mr. Bell had been very helpful to people in the community, "anybody that needs it," with things like mowing grass. RP 262. There were several other trucks in the neighborhood, including one he thought that was "fairly similar," which belonged to "Melissa's dad." RP 263.

The plumbing project had arisen because they had previously talked about how Brevik had "plugged up" his garbage disposal. RP 263. They had tried a couple of different times to get it done but they had not worked out until that day, when Bell had called to suggest it and they had both been available. RP 263. Bell had then driven over and picked up Brevik and they had gone to Home Depot that day in March. RP 263.

Brevik was aware that Bell had dropped off some wood, because Bell told him he had left some outside. RP 263. Brevik has a key to Frazer's place but he knew Bell did not, because Bell had "moved out from before." RP 264.

Michael Bell, Mr. Bell's dad, testified about knowing Frazer and her neighbors as well. RP 267. He said he "wasn't totally" aware of all Bell's restrictions but was aware he was supposed to stay at his trailer every night and said, "I made sure that he was there." RP 268.

The truck belonged to him, Michael Bell said, and he made sure it was at his home every night. RP 268-69. A couple of times when he thought he did not see the truck because of the glare from

the rain, he had called his son, finding out that he was asleep inside the trailer. RP 269.

Mr. Bell's father also explained that the situation was different before the first violation. RP 272. At that time, Mr. Bell had been working different hours including nights, and his father did not keep much track. RP 272.

Mr. Bell's father is a good friend of Frazer's and went to her house all the time without Bell, including giving her firewood. RP 274. He noted that every time he was at her home, however, "the police drive by" because someone was reporting that Bell was over there when it was actually Bell's dad. RP 274.

Kyle Bell testified and said he did not have contact with Frazer's children between November 2016 and March 2017. RP 276. The only children he had contact with were his daughters, approved through DOC. RP 276. He and Frazer had not had a relationship since he had gotten out of jail in November of 2016. RP 276-77. He said they were definitely in love with each other and did want to be together. RP 277. He also said that people told him about Frazer being in depression, just like him, so they decided to communicate about how they felt, saying "I love you, I miss you." RP 277. But they did not have a sexual or romantic relationship at that time. RP 277-8.

When asked if the corrections officer was aware of the current relationship between Frazer and Bell in mid-March, Bell explained that he had asked his CCO on the day after release, "can I have

contact with Lindsey?" RP 278. Anderson had told Bell, "you're walking a fine line there. There's nothing that says you can't, but please be careful." RP 278. Bell had told people at the polygraph tests about being in love but not being together, too. RP 278.

Most of the pictures that were on the phone were not when they were in a relationship. RP 29. He said the pictures of them kissing were posed when their paths crossed and they had lunch or something. RP 279.

Mr. Bell testified that there was a time he went to Frazer's home to pick something up or drop something off and ended up taking some time to clean up a little for an hour or so. RP 280. He then left. RP 280.

Bell admitted he was around the kids all the time before the first violation. RP 281-82. He said he loved those kids and considered them his own but was not around them after his release at all. RP 282. He had seen them in passing once in a store and just kept driving and left. RP 282.

On the day Anderson contacted him at Brevik's trailer, Bell reiterated, he had not had any contact with the children at all. RP 282. Bell recalled that Brevik said that Frazer and the kids were outside and Brevik would go tell them to go in the house and wait outside himself and that's what they did. RP 282. Bell rattled off the pipe and items they got from Home Depot and put in the back of his dad's truck. RP 283. Bell called Frazer just to let her know they were leaving Home Depot and coming back and either Brevik or Bell

would let her know when he was done and had left. RP 283. He did not go to her house that day but said "[m]aybe in the morning if the kids weren't there I might have stopped by." RP 284.

On cross-examination, the prosecutor noted that the text correspondence was "very, very intense," with messages on March 16, 2017, at 6:06 a.m., 6:13 a.m., 7:51 a.m., 7:52 a.m., 8:11 a.m., 8:23 a.m., 8:25 a.m. "And so forth." Bell maintained he had similar messaging with several people on particular days. RP 293.

In ruling, the lower court found that the state had not proven the claim that Mr. Bell had contact with minors "on several occasions on or after March 15, 2017," by a preponderance of the evidence. RP 304.

The judge found, however, that Bell had failed to "complete SSOSA treatment as directed by the Court on or after March 29th," and that the failure was "willful." RP 304. The court made its decision based "upon the testimony of the community corrections officer that Mr. Bell was removed from the SSOSA treatment" and the stated reason that the reason was his "violation of the provision not to have a relationship unless it is approved in advance by the treatment provider." RP 304. The judge was convinced by the text messages and their volume, including that many were "day-to-day things that you would do in a relationship." RP 304. The judge then revoked the SSOSA. RP 305-308.

D. ARGUMENT

THE LOWER COURT'S DECISION TO REVOKE THE SPECIAL SEX OFFENDER SENTENCING ALTERNATIVE SHOULD BE REVERSED AND SEVERAL CONDITIONS OF COMMUNITY CUSTODY SHOULD BE STRICKEN

Under RCW 9.94A.670(2)(a), a court may impose a Special Sex Offender Sentencing Alternative (SSOSA) if the defendant affirmatively pleads guilty, has no prior convictions for a sex offense or a recent adult violent offense, and several other requirements are met. Before a SSOSA can be ordered, there must be an examination to determine if the offender is amenable to treatment. RCW 9.94A.670(3). If the court concludes that the offender and the community will benefit and after the court considers the circumstances of the offense and makes a balancing including the victim's opinion, the court may impose a sentence, suspend it and impose mandatory conditions of the suspension. RCW 9.94A.670(4) and (5). Those include treatment for up to five years, and not changing sex offender providers or treatment conditions without notice, while the non-mandatory conditions include remaining within geographical limits, paying legal financial obligations, performing "community restitution work," and paying for counseling. RCW 9.94A.670(5) and (6).

Under RCW 9.94A.670(10)(a), if there is a violation of the conditions, the department can impose certain sanctions or refer the violation to the court for the recommendation of revocation. RCW 9.94A.670(11) provides authority for a trial court to "revoke the

suspended sentence" at any time and order execution of the sentence if "[t]he offender violates the conditions of the suspended sentence," or "the court finds that the offender is failing to make satisfactory progress in treatment." See State v. McCormick, 166 Wn.2d 689, 705, 213 P.3d 32 (2009).

A court is not required to revoke a SSOSA, however, and may impose other sanctions. State v. Bigsby, 189 Wn.2d 210, 309 P.3d 540 (2017). Under RCW 9.94A.660(6) and (7), RCW 9.94A.670(10), (11), and (12), and RCW 9.94A.655(5), (6), and (7), "when an offender is sentenced to community custody under special sentencing alternatives for certain drug or sex crimes, or because the offender is a parent, the court has concurrent supervisory authority with the Department over these offenders." Bigsby, 189 Wn.2d at 215.

In general, a court's decision to revoke a SSOSA is reviewed for abuse of discretion. McCormick, 166 Wn.2d at 705-706. A trial court abuses its discretion if it acts on untenable grounds, or for untenable reasons, including if the court acts based upon a misunderstanding of law. Id.

But this Court also reviews alleged violations of due process rights de novo. State v. Simpson, 136 Wn. App. 812, 816, 150 P.3d 1167 (2007).

Applying such review here, this Court should reverse. The rights of a defendant at a revocation hearing are different than rights which attach at most criminal trials. See McCormick, 166 Wn.2d at 05. The revocation of a suspended sentence such as a SSOSA is not

considered a criminal proceeding but rather "an extension of the original criminal conviction." McCormick, 166 Wn.2d at 699. As a result, an offender facing revocation of a SSOSA has "minimal" due process rights - but those rights do exist. See State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999).

As a result, proof of a violation of the conditions of the suspended sentence "need not be established beyond a reasonable doubt but only must 'reasonably satisfy' the court [that] the breach of [a] condition occurred." See State v. Badger, 64 Wn. App. 904, 908, 827 P.2d 318 (1992); see State v. Kuhn, 81 Wn.2d 648, 650, 503 P.2d 1061 (1972). But the defendant is also guaranteed sufficient written notice, the right to confront and cross-examine witnesses unless there is good cause to excuse confrontation, disclosure of the evidence, a neutral and detached decision-maker and a statement by the decision-maker as to the evidence relied upon in ordering the revocation. Dahl, 139 Wn.2d at 683; see Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed 2d 484 (1972).

In this case, the Court should reverse the decision revoking Mr. Bell's SSOSA sentence, because the state failed to give Mr. Bell adequate written notice. The state filed a "PETITION FOR ORDER MODIFYING SENTENCE/REVOKING SENTENCE/CONFINING DEFENDANT." CP 130. That Petition alleged violation by referring to the report attached. CP 130. It also explicitly stated the relief the state sought, as follows:

4. The undersigned petitions the court for an order:

[ ] Modifying sentence.

[ ] Revoking the sexual offender alternative suspended sentence and ordering execution of sentence.

[ ] Confining the defendant pursuant to RCW 9.94A.200(2)(b).

[X] Requiring the defendant to show cause why he should not be punished for noncompliance with sentence.

CP 130.

Thus, Mr. Bell was not given adequate written notice to satisfy minimal due process. The state gave notice it would be seeking some punishment for noncompliance. CP 130. It did not, however, give notice in writing that it was seeking to revoke the SSOSA and "ordering the execution of sentence." Instead, it specifically selected only the option of *punishment* for the noncompliance, not revocation of the suspended sentence. CP 130.

Notably, on April 4, 2017, when the parties came before the court, Judge Goodell identified the proceeding as a "SSOSA show cause hearing." RP 193. Counsel said Bell was then being served "a copy of the petition, show cause on the SSOSA," and the court said it did not "see a petition filed in this matter." RP 194. It was suggested that the review hearing and "show cause" hearing were rolled into one. RP 194.

When the prosecutor mentioned, however, that the state was "going to be seeking to revoke his SSOSA," that was belied by the document the prosecution had filed - and just served on Mr. Bell - because that document did *not* ask for such relief. RP 196; CP 130-34.

On April 25, the next hearing, the judge identified the proceedings as a "show cause and an evidentiary hearing" and the parties discussed doing that hearing and a "SSOSA review" at that time. RP 199.

There is no question that, at the hearing on May 26, 2017, before the testimony, the prosecution said the matter was before the court "on the State's motion to revoke Mr. Bell's SODA- - SSOSA sentence." RP 200. It did not give adequate written notice of an intent to revoke the SSOSA to satisfy the minimal due process which applies. See Dahl, 139 Wn.2d at 683. This Court should so hold.

In addition, even if there had been sufficient notice, Mr. Bell should be granted relief, because the trial court abused its discretion in revoking the SSOSA based on the termination from treatment.

At trial, the community corrections officer testified that he spoke with Bell's treatment provider, who informed him that Bell had a SSOSA contract provision "to have his relationships approved through treatment" and that based on the text messages, "he was clearly in a relationship with Ms. - - Ms. Frazer, and that's what put him in violation of his treatment and got him discharged from treatment." RP 213.

The revocation, however, was based on the community corrections officer having reported his beliefs about the behavior in which Mr. Bell was engaged, which included the CCO's belief that Bell was actually having contact with the kids and the nature of the relationship with Ms. Frazer. RP 304-306. The treatment provider terminated Bell right after hearing the allegations from the CCO -

the bulk of which the lower court found the state had failed to prove even by a preponderance of the evidence. This Court should hold that the trial court abused its discretion in revoking the SSOSA.

Finally, several of the conditions of the SSOSA were not authorized and should not have been imposed. A court's authority to impose conditions of a suspended sentence are limited to those conditions the Legislature has authorized by statute. See State v. Zimmer, 146 Wn. App. 405, 414, 190 P.2d 121 (2008), review denied, 165 Wn.2d 1035 (2009). An unauthorized condition is in excess of the court's authority and should be stricken. See State v. O'Cain, 144 Wn. App. 2, 75, 184 P.3d 1262 (2008). This Court will address an illegal condition even if the condition has yet to be enforced where, as here, the appellant is arguing that the condition is not authorized by the law and no further factual development is required. See State v. Bahl, 164 Wn.2d 739, 744-46, 193 P.3d 678 (2008).

Notably, there is no presumption of constitutionality applied to conditions of community custody. See State v. Sanchez Valencia, 169 Wn.2d 782, 792-93, 239 P.3d 1059 (2010).

Conditions 8 and 11 should be stricken. Under both state and federal due process, a defendant is entitled to fair notice and warning of what conduct she must avoid. Bahl, 164 Wn.2d at 752. There must be both sufficient notice and sufficient standards to protect against arbitrary or capricious enforcement. See id; see also, State v. Sansone, 127 Wn. App. 630, 638, 111 P.3d 1251 (2005). While an exacting standard of certainty is not required, a condition must be

sufficiently specific so as to give an average, ordinary person the ability to understand exactly "what conduct is prescribed." Sanchez Valencia, 169 Wn.2d at 785. The also doctrine protects against arbitrary or discriminatory enforcement. State v. Halstein, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993).

Here, condition 8 does not meet the constitutional requirements. That condition provides that "[t]he defendant shall not loiter in nor frequent places where children congregate such as parks, video arcades, and day care facilities or other such places as may be designated by the CCO and/or the state certified sexual deviancy treatment provider[.]" CP 63.

A prohibition is void for vagueness if it does not define the offense with sufficient definiteness such that ordinary people can understand exactly what conduct is prohibited or provide "ascertainable" standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53; State v. Sullivan, 143 Wn.2d 162, 181-82, 19 P.3d 1012 (2001). Thus, where a defendant was ordered to stay away from areas where children were "known to congregate" and designating what places were prohibited was up to the CCO, the condition was unconstitutionally vague for failing to provide adequate notice and because making its scope subject to determination by the CCO without further definition made the condition vulnerable to arbitrary and capricious enforcement. State v. Irwin, 191 Wn. App. 644, 364 P.3d 830 (2015).

Similarly, here, condition 8 first provides some definition,

then completely expands it to allow the CCO to define what places "children congregate" - as well as what conduct will amount to "loitering" or "frequenting" such places. The condition is in violation of due process and should be stricken.

In addition to due process, other constitutional rights, including the First Amendment, apply. See Bahl, 164 Wn.2d at 56-57. A person convicted of a crime is not divested of all First Amendment rights. See id. Thus, if a condition affects freedom of movement or association, or other actions protected under the First Amendment, there is a more strict standard of definiteness for a condition to establish what is prohibited. Id. As a result, a condition restricting a fundamental rights is only proper if it is "reasonably necessary to accomplish essential needs of the state and public order." Bahl, 164 Wn.2d at 757-58.

Condition 11 does not meet those requirements, and violates the due process right to bodily integrity. See In re Marriage of Parker, 91 Wn. App. 219, 223-24, 95 P.2d 256 (1998). Condition 11 provides, "[t]he defendant shall undergo periodic polygraph and/or plethysmograph testing to measure treatment progress and compliance at a frequency determined by his/her treatment provider and/or his/her Community Corrections Officer." CP 63.

Plethysmographic testing is extremely intrusive, requiring the restraint and monitoring of the intimate parts of someone's body while they are exposed to pornographic pictures and monitored to see which images cause sexual stimulation. Parker, 91 Wn. App. at

224. As a result, the testing implicates the due process rights to be free from bodily intrusion under the Fifth and 14th Amendments and Article 1, § 3. Parker, 91 Wn. App. at 224; see State v. Land, 172 Wn. App. 593, 605, 295 P.3d 782, review denied, 177 Wn.2d 1016 (2013).

Requiring submission to plethsymograph testing at the discretion of the community corrections officer as a routine monitoring tool violated Mr. Bell's rights to be free from unlawful bodily intrusions. Land, 172 Wn. App. at 605. In Land, the Court examined a similar condition and held that plethsymograph testing "can properly be ordered incident to crime-related treatment by a qualified provider," but not as a monitoring tool used by a CCO. 172 Wn. App. at 605-606. Here, condition 11 specifically imposing the testing as a monitoring tool, subject to the discretion of the CCO. The condition is improper and should be stricken.

E. CONCLUSION

For the reasons stated herein, this Court should hold that Mr. Bell did not receive adequate written notice, the trial court abused its discretion in revoking the SSOSA, and that conditions 8 and 11 of community custody were improper and must be stricken.

DATED this 25th day of April, 2018.

Respectfully submitted,

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DECLARATION OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Opening Brief to opposing counsel VIA this Court's upload service, to Mason County Prosecutor's Office, at timw@co.mason.wa.us and Mr. Bell, at. DOC 372002, Monroe CC, WSR, P.O. Box 777, Monre, WA. 98272.

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