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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

KYLE THOMAS BELL, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Toni Sheldon, Judge

No. 13-1-00292-2

BRIEF OF RESPONDENT

MICHAEL DORCY
Mason County Prosecuting Attorney

By
TIM HIGGS
Deputy Prosecuting Attorney
WSBA #25919

521 N. Fourth Street
PO Box 639
Shelton, WA 98584
PH: (360) 427-9670 ext. 417

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A. STATE'S COUNTER-STATEMENTS OF ISSUES
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

- 1) Although the revocation petition did not specify in writing that the State would seek revocation of the SSOSA suspended sentence as a consequence of Bell's SSOSA suspended sentence conditions, because the State gave Bell written notice of the violations and also provided written notice of the facts supporting those violations, no due process violation occurred.
- 2) The trial court did not abuse its discretion by revoking the SSOSA suspended sentence when the treatment provider expelled Bell from the program prior to completion because he had an unauthorized relationship with a girlfriend.
- 3) Because the trial court's order prohibiting Bell from frequenting places where children congregate included a series of descriptive terms that defined the kinds of places that he was prohibited from frequenting, the order is not unconstitutionally vague.
- 4) As a condition of community custody, the trial court ordered that Bell undergo plethysmograph testing at the direction of his community custody officer or his treatment provider. The State contends that the requirement that Bell submit to plethysmograph testing at the direction of his community custody officer should be stricken from the conditions of community custody but that the condition should be otherwise affirmed.

B. FACTS AND STATEMENT OF THE CASE

In this case, the defendant-appellant, Kyle Bell, pled guilty to the charge of rape of a child in the second degree. CP 35; RP 60. The court sentenced Bell to a SSOSA suspended sentence. CP 49-64; RP 91-102.

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There were repeated violations of the conditions of the SSOSA suspended sentence. RP 102-09, 124-128, 134-35, 136-37, 138-144, 190.

Ultimately, Bell was unable to successfully complete the required treatment because he was expelled from the treatment program for having an unauthorized relationship with a girlfriend, which resulting the court revoking the SSOSA suspended sentence. RP 205, 303-09.

Bell now appeals the trial courts exercise of its discretion to revoke the SSOSA suspended sentence, and he appeals two of the conditions of the SSOSA sentence. Further facts are provided below, as needed to develop the State's arguments.

C. ARGUMENT

1. Although the revocation petition did not specify in writing that the State would seek revocation of the SSOSA suspended sentence as a consequence of Bell's SSOSA suspended sentence conditions, because the State gave Bell written notice of the violations and also provided written notice of the facts supporting those violations, no due process violation occurred.

On March 30, 2017, after having been arrested on a warrant, Bell was before the Mason County Superior Court on a new violation of his SSOSA conditions. RP 189-91. The Department of Corrections (DOC) was alleging two new violations. CP 127. These violations included that

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Bell violated conditions by having unauthorized contact with minors and that he failed to complete SSOSA treatment as directed by the court. CP 127. DOC recommended that the trial court revoke the SSOSA sentence. CP 129. Because these violations were Bell's second or subsequent violations, DOC was acting in compliance with RCW 9.94A.670(10)(b) when by recommending revocation of the SSOSA sentence. CP 128-29. The evidentiary hearing on the new violations was eventually held on May 26, 2017. RP 200.

On March 31, 2017, the prosecutor filed a petition alleging the new violations. CP 130-34. The petition was captioned as "Petition for Order Modifying Sentence / Revoking Sentence / Confining Defendant[.]" CP 130. The preprinted, boilerplate order contained various statements that could be selected by checking a box. CP 130. Under paragraph 4, the box stating "Revoking the sexual offender alternative suspended sentence and ordering execution of the sentence" was unchecked; instead, the box stating "Requiring the defendant to show cause why he or she should not be punished for noncompliance with sentence" was checked. *Id.* The DOC violation report, which identified the factual allegations and the corresponding violations of the SSOSA conditions, was incorporated by reference and attached to the petition. CP 130-34.

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At the April 4, 2017, hearing, the prosecutor stated on the record that the State was recommending revocation of the SSOSA. RP 197. The DOC violation report stated in writing that the DOC was seeking revocation. CP 134. Nevertheless, for the first time on appeal, Bell now alleges that his due process rights were violated because the prosecutor did not inform him in writing that the State was seeking revocation of the SSOSA order. Br. of Appellant at 20-24. Contrary to Bell's assertions on appeal, however, a sexual offender is entitled to "written notice of the claimed violations[,]” but there is no specific requirement that the offender receive written notification of the State's contingent recommendation of revocation in the event that one or all of the alleged violations is proved. *State v. Dahl*, 139 Wn.2d 678, 683, 990 P.2d 396 (1999). Because Bell received written notification of the alleged violations, his due process rights were not offended. *Id.*

- 2) The trial court did not abuse its discretion by revoking the SSOSA suspended sentence when the treatment provider expelled Bell from the program prior to completion because he had an unauthorized relationship with a girlfriend.

A trial court's decision to revoke a SSOSA suspended sentence is reviewed for an abuse of discretion. *State v. Badger*, 64 Wn. App. 904, 908, 827 P.2d 318 (1992). "A trial court abuses its discretion when its

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PO Box 639
Shelton, WA 98584
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decision is manifestly unreasonable or is based on untenable grounds.” *State v. Partee*, 141 Wn. App. 355, 361, 170 P.3d 60 (2007). “The court may revoke the suspended sentence at any time during the period of community custody and order execution of the sentence if: (a) The offender violates the conditions of the suspended sentence, or (b) the court finds that the offender is failing to make satisfactory progress in treatment.” RCW 9.94A.670(11); *see also*, *State v. McCormick*, 166 Wn.2d 689, 705, 213 P.3d 32 (2009).

Here, the trial court found that Bell failed to make satisfactory progress in treatment because he was expelled by his treatment provider for having an unapproved relationship with his girlfriend. RP 304. The court noted that Bell had exchanged hundreds of text messages between Bell and his girlfriend and that these messages evidenced a relationship between them. RP 304-05. The trial court judge specifically found that “there was a relationship between Mr. Bell and [his girlfriend]; that that was a relationship that had gotten Mr. Bell into trouble before, and he definitely was aware of the fact that having such a relationship was prohibitive.” RP 305. The record supports the trial court’s findings. RP 206-214, 218, 222-23, 279, 287-95, 297.

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PO Box 639
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On these facts, the trial court did not abuse its discretion by revoking the SSOSA suspended sentence. *State v. Badger*, 64 Wn. App. 904, 908, 827 P.2d 318 (1992).

3. Because the trial court's order prohibiting Bell from frequenting places where children congregate included a series of descriptive terms that defined the kinds of places that he was prohibited from frequenting, the order is not unconstitutionally vague.

As one of several conditions of community custody, the trial court ordered as follows: "The defendant shall not loiter in nor frequent places where children congregate such as parks, video arcades, campgrounds, 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 61 (para. 8). On appeal, Bell contends that this restriction is unconstitutionally vague. Br. of Appellant at 26.

The language at issue here – "[t]he defendant shall not loiter in nor frequent places where children congregate such as parks, video arcades, and day care facilities or should other places as may be designated the CCO and/or the state certified sexual deviancy treatment provider" – does not require further definition by a corrections officer. CP 61 (para. 8). The language at issue here provides "clarifying language" and "an

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illustrative list of prohibited locations,” and this language does not enable arbitrary enforcement by the CCO. *State v. Irwin*, 191 Wn. App. 644, 655, 364 P.3d 830 (2015).

The due process clauses of the 14th Amendment to the United States Constitution and article I, section 3 of the Washington Constitution require that community custody conditions such as the one at issue in the instant case not be vague. *Irwin* at 652-53. To sustain a constitutional vagueness challenge, the community custody condition at issue must provide ordinary people with fair warning of what conduct is proscribed and must have standards that are definite enough to guard against arbitrary enforcement. *Id.* at 652-53 (citing *State v. Bahl*, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008)). “However, “a community custody condition is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.”” *Irwin* at 653 (quoting *State v. Sanchez Valencia*, 169 Wn.2d 782, 793, 239 P.3d 1059 (2010) (internal quotation marks omitted) (quoting *State v. Sanchez Valencia*, 148 Wn. App. 302, 321, 198 P.3d 1065 (2009))).

The State contends that the language at issue here complies with the requirements of the 14th Amendment and Wash. Const. art. I, section 3,

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PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

because the language does not delegate interpretation to a corrections officer, and because it provides a list of clear examples of the kinds of places where children congregate and that Bell is thus prohibited from frequenting.

4. As a condition of community custody, the trial court ordered that Bell undergo plethysmograph testing at the direction of his community custody officer or his treatment provider. The State contends that the requirement that Bell submit to plethysmograph testing at the direction of his community custody officer should be stricken from the conditions of community custody but that the condition should be otherwise affirmed.

As a part of the judgment and sentence, the court that “[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 Custody Officer[.]” CP 61 (para. 11).

It is within the statutory authority of the court to order Bell to perform affirmative acts that assure compliance with sentencing conditions. RCW 9.94A.505(8), .703(3)(c) & (d); *State v. Riles*, 135 Wn.2d 326, 342-46, 957 P.2d 655 (1998), abrogated on other grounds by *State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010). It is within the authority of the court to order plethysmograph testing where it is to be

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PO Box 639
Shelton, WA 98584
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used as a treatment device by the treatment provider. *Riles* at 345-46. But “plethysmograph testing does not serve a monitoring purpose.” *Id.* at 345. “Plethysmograph testing serves no purpose in monitoring compliance with ordinary community placement conditions.” *Id.*

The condition at issue in the instant case is similar to one that was at issue in the recent case of *State v. Land*, 172 Wn. App. 593, 295 P.3d 782 (2013). The trial court in *Land* ordered the defendant to “[p]articipate in... plethysmograph examinations as directed by your Community Corrections Officer.” *Id.* at 605 (quoting the trial court order). On review, the Court of Appeals disapproved of the trial court condition, remanded the matter to the trial court with instructions to strike the condition, and ruled as follows:

Plethysmograph testing is extremely intrusive. The testing can properly be ordered incident to crime-related treatment by a qualified provider. *State v. Castro*, 141 Wn. App. 485, 494, 170 P.3d 78 (2007). But it may not be viewed as a routine monitoring tool subject only to the discretion of a community corrections officer.

Id. at 605-06.

Thus, the State in the instant case must concede that while it was proper for the trial court to order Bell to undergo plethysmograph testing as directed by his treatment provider, it was beyond the court’s statutory

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PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

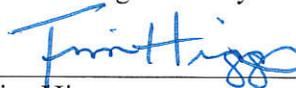
authority to order Stoll to undergo plethysmograph testing at the unrestrained discretion of his community corrections officer. The State, therefore, asks the court to order the trial court to strike the requirement that Bell submit to plethysmograph testing at the discretion of his probation officer, and to strike the condition that he submit to plethysmograph testing as a compliance measure, but to otherwise sustain the trial court's order relating to polygraph and plethysmograph testing. CP 61 (para. 11).

D. CONCLUSION

The State asks this Court to sustain the trial court's revocation of the SSOSA suspended sentence and the community custody conditions at issue, except that the State contends that the case should be remanded for the trial court to strike the condition that Bell submit to plethysmograph testing as a monitoring tool at the discretion of the CCO.

DATED: July 25, 2018.

MICHAEL DORCY
Mason County
Prosecuting Attorney



Tim Higgs
Deputy Prosecuting Attorney
WSBA #25919

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Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

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Address:
PO BOX 639
SHELTON, WA, 98584-0639
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