

FILED
Court of Appeals
Division II
State of Washington
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No. 50613-1-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

CHARLES CHRISTOPHER JOHNSON,

Appellant.

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

MOTION TO WITHDRAW AND BRIEF IN SUPPORT

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A. IDENTITY OF MOVING PARTY

Sean M. Downs, appointed counsel for appellant, Charles Johnson, requests the relief designated in Part B.

B. STATEMENT OF RELIEF SOUGHT

Appointed counsel requests permission to withdraw pursuant to RAP 18.3(a)(2), *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and *State v. Hairston*, 133 Wn.2d 534, 946 P.2d 397 (1997).

C. FACTS RELEVANT TO MOTION

Sean M. Downs was appointed to represent Mr. Johnson on his appeal of his DOSA revocation in Mason County Superior Court entered on May 16, 2017. CP 6-8. In reviewing appellant's case for issues to raise on appeal, counsel has done the following:

1. Read and reviewed the verbatim report of proceedings;
2. Read and reviewed the superior court file;
3. Solicited from appellant's counsel any issues he believed warranted appellate review;
4. Researched all pertinent legal issues concerning possible legal and factual bases for appellate review; and
5. Conferred with other attorneys concerning the relative merits of any potential issues in Mr. Johnson's appeal.

D. GROUNDINGS FOR RELIEF

Counsel has “master[ed] the trial record, thoroughly researched the law, and exercise[d] judgment in identifying the arguments that may be advanced on appeal.” *State v. Robinson*, 58 Wn. App. 599, 603, 794 P.2d 1293 (1990) (quoting *McCoy v. Court of Appeals, Dist. 1*, 486 U.S. 429, 438, 108 S.Ct. 1895, 100 L.Ed.2d 440 (1988)). RAP 18.3(a)(2) allows an attorney to withdraw on appeal if counsel can find no good faith argument on review. Counsel now requests this Court independently review the record in order to determine whether there is any further basis for appellate review. *Hairston*, 133 Wn.2d at 538. In the event that the Court concurs, the undersigned seeks to withdraw as appointed counsel on appeal without prejudice to the appellant’s right to proceed *pro se*.

E. MATTERS IN THE RECORD ARGUABLY SUPPORTING REVIEW

On June 13, 2016, Mr. Johnson was convicted of one count of Unlawful Possession of a Controlled Substance – Methamphetamine and two counts of Bail Jumping on a Class B or C Felony. CP 54-69. He was sentenced to the Residential Drug Offender Sentencing Alternative. *Id.*

On August 2, 2016, a show cause hearing was held based on an allegation of failing to complete chemical dependency treatment due to discharge on July 15, 2016. CP 49-51; RP 1. Tony Prentice, the

administrator for American Behavioral Health Systems (“ABHS”) in Chehalis testified that Mr. Johnson was discharged due to a needing a higher level of care for mental health issues. RP 2-3. Community Corrections Officer (“CCO”) Laura Cole testified that ABHS has a dual-diagnosis facility in Spokane. RP 15. She was later able to confirm that the Spokane facility would accept Mr. Johnson into the facility. RP 31. MR. Johnson testified that he was discharged from ABHS without warning and he was not advised of his rights and responsibilities by staff. RP 19-20. The State cross-examined Mr. Johnson about how much his military benefits were for the purpose of why Mr. Johnson decided “to live homelessly”. RP 22-23. The court allowed the State to question Mr. Johnson over defense objection as to relevance. RP 23. The parties suggested to the court that Mr. Johnson continue his inpatient treatment at the ABHS facility in Spokane. RP 31-33. The court found that there was a violation of the DOSA sentence due to Mr. Johnson causing a disruption at the facility such that the facility discharged him. RP 34. The court authorized Mr. Johnson to serve his treatment time at the ABHS facility in Spokane. RP 34.

On August 9, 2016, the court held a review hearing and Mr. Johnson still did not have a bed date for ABHS. RP 36. He continued to be held at the local jail in the interim, over defense objection. RP 36-37.

On August 16, 2016, the court formalized an order finding a willful violation of DOSA and ordering that Mr. Johnson be released to ABHS in Spokane on his bed date of August 18, 2016. CP 34-38.

The Department of Corrections (“DOC”) filed a notice of alleged violations of DOSA. CP 25-27. It was alleged that Mr. Johnson was successfully discharged from ABHS on October 21, 2016, but he did not check in with DOC as required by October 24, 2016. CP 26. On October 18, 2016, a hearing was held regarding the alleged DOSA violation. RP 45. No action was taken by the court. RP 48-49.

On May 9, 2017 an evidentiary show cause hearing was held based on the allegations from October 2016. RP 50. CCO Cole testified that Mr. Johnson failed to check in with DOC and failed to report to Northwest Resources for outpatient treatment after his discharge from ABHS. RP 55-56. She admitted that she could not find the logbook that documents when offenders check in to the DOC office. RP 8586. Mr. Johnson testified that he was discharged from ABHS in Spokane on October 21, 2016 in the early morning hours. RP 65. Mr. Johnson took a Greyhound bus to Olympia, which arrived in the late afternoon after a four to five hour delay in Seattle. RP 65-66. Mr. Johnson stayed in a hotel in Shelton on October 24, 2016 and October 25, 2016. RP 67. Mr. Johnson then reported to CCO Charles Johnson, who informed Mr. Johnson that CCO Cole was not

available at that time. RP 68. Mr. Johnson went to report to the Northwest Resources office in the Collier Building, but it was empty. RP 69. CCO Cole indicated in her testimony that Northwest Resources had moved their office from the Collier Building. RP 61. Mr. Johnson admitted that he did not report to DOC in January and February and he was taken into custody in February 2017. RP 76-77.

The court found that Mr. Johnson committed three willful violations of his DOSA sentence: (1) that he failed to report to DOC on October 24, 2016; (2) that he failed to submit to a weekly urine analysis as required; and (3) that he failed to comply with the chemical dependency program as directed by not checking in with Northwest Resources. RP 93-95. Accordingly, the court revoked Mr. Johnson's DOSA sentence RP 101.

This appeal follows.

F. POTENTIAL ARGUMENTS

1. Whether the court impermissibly admitted irrelevant evidence of Mr. Johnson's financial background.

Mr. Johnson could argue that the court impermissibly allowed irrelevant evidence regarding Mr. Johnson's financial background to be admitted during the August 2, 2016 hearing.

The seminal case involving a defendant’s due process rights at a parole (or probation¹) revocation hearing is the United States Supreme Court decision in *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593 (1972). *State v. Abd-Rahmaan*, 154 Wn.2d 280, 285, 111 P.3d 1157 (2005).

In *Morrissey*, the Court addressed “whether the Due Process Clause of the Fourteenth Amendment requires that a State afford an individual some opportunity to be heard [before] revoking his parole.” *Morrissey*, 408 U.S. at 472. Beginning with the assumption that the revocation of probation is not part of a criminal prosecution and recognizing that an individual is not guaranteed his or her “full panoply of rights” in a probation revocation setting, the *Morrissey* Court held that the Fourteenth Amendment guarantees a defendant minimum due process rights because a probation revocation involves deprivation of conditional liberty. *Abd-Rahmaan*, 154 Wn.2d at 285 (quoting *Morrissey*, 408 U.S. at 480). Thus, the following minimum due process protections are required in a probation revocation hearing:

- (a) written notice of the claimed probation violations;
- (b) disclosure to the probationer of evidence against him;

¹ Despite the minor differences between probation and parole revocations, the United States Supreme Court has noted they are constitutionally indistinguishable. *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 93 S. Ct. 1756 (1973).

- (c) opportunity to be heard in person and to present witnesses and documentary evidence;
- (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);
- (e) a neutral and detached hearing body; and
- (f) a written statement by the factfinder as to the evidence relied on and the reasons for revoking probation.

Morrissey, 408 U.S. at 489. These requirements exist to ensure that a revocation of probation will be based on verified facts and accurate information regarding the probationer's behavior. *Abd-Rahmaan*, 154 Wn.2d at 286. The *Morrissey* Court further stated that the process should be flexible, allowing the admission of evidence that would not be admitted in a criminal trial, including letters and affidavits. *Morrissey*, 408 U.S. at 489. The Washington Supreme Court has applied these minimal due process requirements of *Morrissey* to a revocation hearing in *State v. Dahl*, 139 Wn.2d 678, 990 P.2d 396 (1999). *Abd-Rahmaan*, 154 Wn.2d at 286.

In the instant case, it was totally irrelevant pursuant to ER 402 whether Mr. Johnson decided to "live homelessly" or not. That information should not have been considered by the court.

G. CONCLUSION

Based on the foregoing reasons, counsel for the appellant requests this Court grant the motion to withdraw as appointed counsel on appeal, and that appellant be allowed to proceed *pro se* should he choose to do so.

Respectfully submitted this 19th day of January, 2018

s/ Sean M. Downs
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CERTIFICATE OF SERVICE

I, Sean M. Downs, a person over 18 years of age, served the Mason County Prosecuting Attorney a true and correct copy of the document to which this certification is affixed, on January 19, 2018 to email address timw@co.mason.wa.us. Service was made by email pursuant to the Respondent's consent. On the same date, I also served Appellant, Charles C. Johnson, a true and correct copy of the document to which this certification is affixed as well as a copy of the verbatim report of proceedings, via first class mail postage prepaid to Appellant's last known address at General Delivery, Shelton, WA 98584.

s/ Sean M. Downs

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