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NO. 52110-5-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JANELLE LELLI,  
Appellant.

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

The Honorable Elizabeth P. Martin Judge

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BRIEF OF APPELLANT

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LISE ELLNER, WSBA No. 20955  
SPENCER BABBIT, WSBA No. 51076  
Attorneys for Appellant

LAW OFFICES OF LISE ELLNER  
Post Office Box 2711  
Vashon, WA 98070  
(206) 930-1090

**TABLE OF CONTENTS**

	<b>Page</b>
A. ASSIGNMENTS OF ERROR.....	1
Issues Presented on Appeal.....	1
B. STATEMENT OF THE CASE.....	2
Revocation Hearing.....	3
C. ARGUMENT.....	6
1. THE TRIAL COURT REVOKED MS. LELLI'S FOSA IN VIOLATION OF HER RIGHT TO DUE PROCESS BECAUSE THE STATE FAILED TO PROVE THE ALLEGED VIOLATIONS BY A PREPONDERANCE OF THE EVIDENCE .....	6
a. Due Process requires that the state prove an alleged FOSA violation by a preponderance of the evidence.....	6
b. The drug tests admitted into evidence are insufficient to prove that Ms. Lelli violated the terms of her FOSA by a preponderance of the evidence.....	8
2. MS. LELLI RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT HER REVOCATION HEARING WHERE TRIAL COUNSEL FAILED TO PRESENT EVIDENCE IN SUPPORT OF HER DEFENSE .....	10

a.	Standard for evaluating a claim of ineffective assistance of counsel.....	10
b.	Ms. Lelli's counsel was deficient at her revocation hearing.....	11
c.	Counsel's deficient performance prejudiced Ms. Lelli.....	13
D.	CONCLUSION.....	15

## TABLE OF AUTHORITIES

Page

### WASHINGTON CASES

<i>In re Crace</i> , 174 Wn.2d 835, 280 P.3d 1102 (2012) .....	10
<i>In re Davis</i> , 152 Wn.2d 647, 101 P.3d 1 (2004) .....	13
<i>In re Pers. Restraint of McNeal</i> , 99 Wn. App. 617, 994 P.2d 890 (2000) .....	7
<i>In re Schley</i> , 191 Wn.2d 278, 421 P.3d 951 (2018) .....	6, 7, 9
<i>Mohr v. Grant</i> , 153 Wn.2d 812, 108 P.3d 768 (2005) .....	7
<i>State v. Dahl</i> , 139 Wn.2d 678, 990 P.2d 396 (1999) .....	7, 12
<i>State v. Jones</i> , 183 Wn.2d 327, 352 P.3d 776 (2015) .....	11, 14
<i>State v. Kylo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009) .....	10
<i>State v. Leavitt</i> , 111 Wn.2d 66, 758 P.2d 982 (1988) .....	11
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995) .....	10, 11
<i>State v. Nelson</i> , 103 Wn.2d 760, 697 P.2d 579 (1985) .....	12
<i>State v. Robinson</i> , 153 Wn.2d 689, 107 P.3d 90 (2005) .....	10

**TABLE OF AUTHORITIES**

	<b>Page</b>
<b>WASHINGTON CASES, continued</b>	
<i>State v. Rupe</i> , 108 Wn.2d 734, 743 P.2d 210 (1987) .....	10
<b>FEDERAL CASES</b>	
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) .....	10
<b>RULES, STATUTES, AND OTHERS</b>	
RCW 9.94A.655 .....	2, 7
WAC 137-104-050 .....	1, 7, 9

A. ASSIGNMENTS OF ERROR

1. The trial court erred when it revoked Ms. Lelli's FOSA because the state failed to prove the alleged violations by a preponderance of the evidence, which is the standard required to comport with due process and WAC 137-104-050(14).

2. Ms. Lelli received ineffective assistance of counsel at her revocation hearing when her counsel was aware evidence was available to refute the state's evidence of drug use but failed to present it to the court or request a continuance to facilitate live testimony.

Issues Presented on Appeal

1. Did the trial court err when it revoked Ms. Lelli's FOSA and the state failed to present sufficient evidence to prove Ms. Lelli used drugs in violation of the terms of her sentence as required under WAC 137-104-050(14)?

2. Did Ms. Lelli receive ineffective assistance of counsel when her attorney was aware of evidence that refuted the state's allegations of drug use but failed to present it to the trial court?

B. STATEMENT OF THE CASE

Janelle Lelli is a 45-year-old mother who has struggled with addiction since her youth. 3/28/18 RP 18, 21. Ms. Lelli was incarcerated in 2002 and 2006 for crimes related to her addiction and completed DOSA treatment programs under the supervision of the Department of Corrections (DOC) that allowed her to achieve sobriety. 3/28/18 RP 18; CP 13. Ms. Lelli maintained her sobriety and law-abiding behavior until 2017 when she suffered a relapse and was charged with identity theft in the second degree, possession of stolen property in the second degree, and forgery. CP 1-4. Ms. Lelli was held in-custody during the pendency of this case and voluntarily completed an in-custody drug treatment program during that time. 3/28/18 RP 19.

Ms. Lelli pleaded guilty as charged and requested a Family and Offender Sentencing Alternative (FOSA) under RCW 9.94A.655 at sentencing. 3/28/18 RP 10. The state opposed Ms. Lelli's request for a FOSA, but the court granted it based on her progress in treatment and the recommendation of her community custody officer, who performed a FOSA risk evaluation. 3/28/18 RP 26; CP 15. The trial court entered judgment and sentenced Ms. Lelli

to a FOSA on March 28, 2018. CP 38-49.

During the FOSA, DOC was forced to use oral swabs in place of urinalysis because her community custody officer was male and could not observe her during collection of urine samples. 6/15/18 RP 4. This testing method concerned Ms. Lelli because she had significant oral surgery that involved pain medication after the entry of her FOSA. 6/29/18 RP 51-52. Due to her concerns, Ms. Lelli alerted her treatment provider that she had been prescribed medication and that it would appear in results of her drug tests. 6/29/18 RP 52.

Oral swab samples collected from Ms. Lelli during her FOSA tested positive for marijuana, methamphetamine, and oxycodone and Ms. Lelli was arrested for violating the terms of her sentence. CP 69-73; 6/15/18 RP 4-6. The state moved to revoke Ms. Lelli's FOSA. CP 74-77. Ms. Lelli contested the allegations and requested a hearing. 6/29/18 RP 4.

#### Revocation Hearing

Ms. Lelli's FOSA revocation hearing was held on June 29, 2018. 6/29/18 RP 6. The alleged violations before the court included multiple positive drug tests, the failure to provide a lawful

prescription for oxycodone, and the failure to undergo a mental health evaluation. 6/29/18 RP 4. The state alleged that Ms. Lelli tested positive for methamphetamine based on oral swab tests collected on March 29, April 11, May 2, and May 16, 2018. CP 53-68. The state also alleged a violation based on a urine test that tested positive for marijuana on April 2, 2018. CP 54. The record also includes two drug tests showing Ms. Lelli's samples negative for all substances. The first is an oral swab collected April 4, 2018 that tested negative for all substances. Ex. 12; 6/29/18 RP 20. Finally, Ms. Lelli provided a hair sample on June 20, 2018 that tested negative for all substances. CP 90-91.

The first witness at the revocation hearing was Daniel Ricketts, who works as a technical manager at the lab that tested Ms. Lelli's oral swabs. 6/29/18 RP 6. Mr. Ricketts confirmed that hair testing is a reliable method of drug testing, and that hair test results can detect drug use going back 90 days from the date of collection. 6/29/18 RP 23. He also testified that a hair follicle likely would not test positive after a single use, but rather would require repeated exposure to the drug over the 90-day period to return a positive result. 6/29/18 RP 24.

The other witness at the revocation hearing was Riveka Crooms, who was Ms. Lelli's community custody officer at the time of the revocation hearing. 6/29/18 RP 33. Ms. Crooms testified that she only was assigned to Ms. Lelli's case on May 29, 2018, which is after the dates of the alleged violations. 6/29/18 RP 51. Ms. Crooms also testified that she noticed Ms. Lelli had several teeth pulled at the time of her arrest. 6/29/18 RP 51-52. Finally, Ms. Crooms acknowledged that Ms. Lelli's most recent treatment report showed her to be in compliance with treatment. 6/29/18 RP 53.

Trial counsel did not call any witnesses but cross-examined both of the state's witnesses and offered one exhibit: the hair follicle test collected from Ms. Lelli after she was arrested for allegedly violating the terms of her FOSA. Ex. 16.

At the conclusion of testimony at the revocation hearing, trial counsel argued to maintain the FOSA by noting that some manufacturers of the oral swabs used to conduct these types of drug tests recommend not using them on a subject who has had oral surgery. 6/29/18 RP 61. However, counsel stated that they were "not able to find someone who was available to testify." 6/29/18 RP 61.

The trial court found Ms. Lelli in violation of her FOSA based on the positive drug tests from March 29, April 2, April 11, May 2, and May 16, 2018. 6/29/18 RP 77. The trial court did not find violations for her failure to secure a mental health evaluation or her use of prescription medication. 6/29/18 RP 76-77. The trial court revoked the FOSA and sentenced Ms. Lelli to 48 months in prison. 7/11/18 RP 6; CP 96-98. Ms. Lelli filed a timely notice of appeal. CP 87.

C. ARGUMENT

1. THE TRIAL COURT REVOKED MS. LELLI'S FOSA IN VIOLATION OF HER RIGHT TO DUE PROCESS BECAUSE THE STATE FAILED TO PROVE THE ALLEGED VIOLATIONS BY A PREPONDERANCE OF THE EVIDENCE

a. Due Process requires that the state prove an alleged FOSA violation by a preponderance of the evidence

The revocation of a special sentencing alternative implicates two liberty interests because it leads to the defendant's incarceration and takes away their opportunity to engage in the treatment programs offered under that sentencing alternative. *In re Schley*, 191 Wn.2d 278, 285-86, 421 P.3d 951 (2018). Criminal

defendants facing revocation of a sentencing alternative have procedural due process rights. *Schley*, 191 Wn.2d 278, 286 (citing *In re Pers. Restraint of McNeal*, 99 Wn. App. 617, 630-34, 994 P.2d 890 (2000)). One of these due process rights is the requirement that the state prove the violations by a preponderance of the evidence. *Schley*, 191 Wn.2d at 286-87 (citing WAC 137-104-050(14)).

The state bears the burden of proof in revoking a special sentencing alternative to “ensure that the finding of a violation of a term of a suspended sentence will be based upon verified facts.” *State v. Dahl*, 139 Wn.2d 678, 683, 990 P.2d 396 (1999). To this end, the evidence must establish that “the proposition at issue is more probably true than not true.” *Schley*, 191 Wn.2d at 287 (quoting *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005)). In the context of this case, the trial court may only revoke Ms. Lelli’s FOSA if it finds by preponderance of the evidence that Ms. Lelli violated the conditions of the sentence or failed to make satisfactory progress in treatment. RCW 9.94A.655(7)(c).

The evidence offered to prove the alleged violations in Ms. Lelli’s case is insufficient to conclude by a preponderance of the

evidence that she engaged in drug use while on her FOSA due to the negative hair follicle test that can trace drug use for 90 days and her consistent progress in treatment. 6/29/18 RP 23, 53.

- b. The drug tests admitted into evidence are insufficient to prove that Ms. Lelli violated the terms of her FOSA by a preponderance of the evidence

The state admitted seven oral swab tests collected from Ms. Lelli to prove she consumed methamphetamine while on her FOSA. Ex. 7-13. The oral swab tests collected on April 4 and April 25, 2018 tested negative for all substances. Ex. 12-13. The oral swab tests dated March 29, April 11, May 2, and May 16 tested positive for methamphetamine. Ex. 7-10. A final swab test that was collected on May 9, 2018 returned positive results for oxycodone. Ex. 11.

During Ms. Lelli's revocation hearing, the defense offered a hair follicle test into evidence with a collection date of June 20, 2018. Ex. 16. That test showed negative results for all substances. Ex. 16. The record also establishes that a hair follicle test detects repeated drug use over a 90-day detection window. 6/29/18 RP 24.

The state's own drug testing expert testified at Ms. Lelli's

revocation hearing that he would expect a hair sample to test positive if the same test subject submitted multiple positive oral samples over the 90-day detection period beginning March 22, 2018 and ending on the collection date of June 20, 2018. 6/29/18 RP 24.

Although the state alleged that Ms. Lelli repeatedly used methamphetamine and other drugs while on her FOSA, none of those substances appear in the hair follicle collected from Ms. Lelli on June 20, 2018. Ex. 16. Because the detection window for this test dates to before Ms. Lelli was sentenced, the negative result demonstrates that Ms. Lelli did not engage in any type of prohibited drug use while on her FOSA.

The evidence in the record fails to establish by a preponderance of the evidence that Ms. Lelli used drugs in violation of the terms of her FOSA –i.e. that is it is more likely true than not that Lelli used illegal drugs. *Schley*, 191 Wn.2d at 287. Accordingly, the trial court’s revocation of the FOSA violated Ms. Lelli’s right to due process as codified in WAC 137-104-050(14).

This court should remand Ms. Lelli’s case to the trial court with instructions to reinstate her FOSA.

2. MS. LELLI RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT HER REVOCATION HEARING WHERE TRIAL COUNSEL FAILED TO PRESENT EVIDENCE IN SUPPORT OF HER DEFENSE

a. Standard for evaluating a claim of ineffective assistance of counsel

A defendant's right to effective assistance of counsel is constitutionally guaranteed at all "critical stages" of a criminal proceeding, including sentencing. *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005) (citing *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210 (1987)). Counsel is considered ineffective if (1) their performance was deficient, and (2) the deficient performance prejudiced the defendant. *In re Crace*, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Counsel's performance is deficient if it fell below an "objective standard of reasonableness based on consideration of all the circumstances." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). To prove prejudice, the defendant must demonstrate that there is a reasonable probability the outcome of

the proceeding would have been different but for counsel's deficient performance. *Kyllo*, 166 Wn.2d at 862 (citing *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988)). A defendant must prove both deficient performance and prejudice to prevail on a claim of ineffective assistance of counsel. *Kyllo*, 166 Wn.2d at 862.

b. Ms. Lelli's counsel was deficient at her revocation hearing

Counsel's performance will not be considered deficient if there is a legitimate strategic or tactical reason for counsel's conduct. *McFarland*, 127 Wn.2d at 336. However, counsel's failure to call witnesses can constitute deficient performance if not done for strategic reasons. *State v. Jones*, 183 Wn.2d 327, 340-41, 352 P.3d 776 (2015).

In *Jones*, the Court held that counsel's performance was deficient when counsel failed to call a witness to testify because counsel had not performed a pretrial interview. *Jones*, 183 Wn.2d at 340-41 (holding that counsel's decision not to call a witness was deficient because it was based on a failure to prepare before trial and not any strategic reason).

Trial counsel argued in closing that some manufacturers of the oral swabs used to conduct these types of drug tests

recommend not using them on a subject who has had oral surgery. 6/29/18 RP 61. However, counsel stated that they were “not able to find someone who was available to testify.” 6/29/18 RP 61.

Trial counsel knew that hair follicle testing was a reliable testing method and knew that use of oral swab tests following oral surgery can compromise the validity of the swab test results. 6/29/18 RP 61. Counsel did not, however, offer a witness to explain those complications or request a continuance so that a witness could be available. 6/29/18 RP 3.

Furthermore, trial courts regularly admit substitutes for live testimony during revocation proceedings in the form of affidavits, reports, or documentary evidence. *Dahl*, 139 Wn.2d at 686 (citing *State v. Nelson*, 103 Wn.2d 760, 764, 697 P.2d 579 (1985)). Despite having the option to offer an affidavit from a witness knowledgeable about oral swab tests, Ms. Lelli’s counsel did not pursue this option and instead relied on cross-examination of the state’s witness, who was unfamiliar with the effects of oral surgery on oral swab testing. 6/29/18 RP 26.

Counsel was fully aware of the issues before the court in advance of the revocation hearing and failed to secure a witness to

support Ms. Lelli's defense, failed to investigate alternative options for offering testimony, and failed to request a continuance to facilitate a witness's appearance. Because there is no legitimate strategic reason for failing to take these steps to defend Ms. Lelli's FOSA, counsel's performance was deficient. *In re Davis*, 152 Wn.2d 647, 742, 101 P.3d 1 (2004) (defendants can prove deficient performance by "showing counsel failed to conduct appropriate investigations to determine what defenses were available, adequately prepare for trial, or subpoena necessary witnesses.").

c. Counsel's deficient performance prejudiced Ms. Lelli

Counsel's deficient performance prejudiced Lelli because the evidence against Lelli was based on suspect lab results that an expert could have refuted. If counsel had engaged an expert, the outcome likely would have differed because first, the expert would have verified the unreliability of the state's swab tests for Ms. Lelli who recently had oral surgery. Second, the expert would have established the reliability of the fair follicle tests to negate the state's evidence. Failing to investigate a method to present this evidence to the court prevented counsel from providing Lelli with a defense that could have altered the outcome of the revocation

hearing.

Counsel's performance also prejudiced Ms. Lelli because counsel failed to provide corroboration for the hair follicle test admitted into evidence showing that Ms. Lelli had not consumed any drugs in the previous 90 days. Corroboration of other evidence is an important consideration in evaluating possible prejudice to a defendant in the context of ineffective assistance of counsel. See *Jones*, 183 Wn.2d at 341-42 (citing the corroboration of other testimony as an important factor in determining whether trial counsel's failure to call a witness prejudiced the defendant).

Thus, the outcome of Ms. Lelli's revocation hearing depended on the court accepting the drug test results the state admitted into evidence as accurate.

Counsel's failure to present any evidence to refute the validity of the oral swab tests, despite the science to do so, prejudiced Ms. Lelli's defense. There is a reasonable probability that counsel's performance affected the outcome of Ms. Lelli's revocation hearing.

This court should reverse the revocation of her FOSA and remand so the trial court can hold another revocation hearing.

#### D. CONCLUSION

The trial court revoked Ms. Lelli's FOSA in violation of her right to due process because the state failed to prove the alleged violations by a preponderance of the evidence. The state's evidence is contradicted by a hair follicle test showing that Ms. Lelli had not used drugs since being sentenced to her FOSA. Furthermore, Ms. Lelli received ineffective assistance of counsel at her revocation hearing because counsel failed to present any evidence to contradict the state's allegations related to methamphetamine use despite having knowledge that such evidence existed. Counsel's failure to present that evidence or at least request a continuance to facilitate its presentation constitutes ineffective assistance of counsel. Based on these errors, this court should remand this case to the trial court with instructions to reinstate Ms. Lelli's FOSA.

DATED this 21<sup>st</sup> day of November 2018.

Respectfully submitted,



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LISE ELLNER, WSBA No. 20955  
Attorney for Appellant



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SPENCER BABBIT, WSBA No. 51076  
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor's Office pcpatcecf@co.pierce.wa.us and Janelle Lelli/DOC#805605, Mission Creek Corrections Center-Women, 3420 NE Sand Hill Road, Belfair, WA 98528a true copy of the document to which this certificate is affixed on November 21, 2018. Service was made by electronically to the prosecutor and Janelle Lelli by depositing in the mails of the United States of America, properly stamped and addressed.



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**LAW OFFICES OF LISE ELLNER**

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