

FILED
Court of Appeals
Division II
State of Washington
12/2/2019 2:03 PM
NO. 53408-8-II

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

STATE OF WASHINGTON, Petitioner

v.

ALEM SKROBO, Respondent

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.18-1-03404-06

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

- I. **The Superior Court erred in entering conclusion 2 “that the statutory scheme for Deferred Prosecution under RCW 10.05 fails to establish any authority of the District Court to revoke a Deferred Prosecution Order based on events occurring after a Petitioner has completed the two-year Deferred Prosecution Program.”**
- II. **The Superior Court erred in entering conclusion 3 that the “1999 legislative extension of time for Dismissal of a Deferred Prosecution case under RCW 10.05.120 did not extend the period of time in which a court may revoke a Deferred Prosecution Order.”**
- III. **The Superior Court erred in entering conclusion 4 that “the statutory scheme for a Deferred Prosecution Program, RCW 10.05 *et seq.*, taken as a whole is vague and ambiguous as to the duration of the Court’s authority to revoke a Deferred Prosecution program, and, and under the rule of lenity must be construed in favor of the Petitioner.”**

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- I. **Whether deferred prosecution (or deferred prosecution program) is a two-year program or a five-year program under RCW 10.05 *et seq.***
- II. **Whether RCW 10.05 *et seq.* gives the trial court authority to revoke a deferred prosecution program based upon a violation of the deferred prosecution order.**
- III. **Whether RCW 10.05 *et seq.* gives the trial court authority to revoke deferred prosecution after successful completion of the two-year treatment program but before five years following entry of the order of deferred prosecution.**

STATEMENT OF THE CASE

Alem Skrobo (hereafter “the defendant” or “Skrobo”), was charged with one count of Driving While Under the Influence (DUI) and one count of Reckless Driving from an incident that occurred on May 12, 2012. The defendant submitted a petition for deferred prosecution pursuant to RCW 10.05.010 on both counts, DUI and Reckless Driving. CP 70-73. The petition was granted by order for deferred prosecution on October 28, 2013. CP 15-19. Among the conditions set in the order for deferred prosecution, the defendant was to “[m]aintain total abstinence from alcohol and all other non-prescribed mind-altering drugs for the duration of the Deferred Prosecution” and to “[r]emain law abiding for the duration of the Deferred Prosecution.” CP 16-17. The defendant completed the two-year drug/alcohol treatment program on November 30, 2015. CP 77.

The defendant was subsequently arrested for one count of Hit & Run, one count of Driving While Under the Influence, and one count of Reckless Endangerment from an incident occurring on December 3, 2017 in Clark County District Court, Case No. 217181P. On September 24, 2018, the defendant pleaded guilty to one count of Hit & Run and one count of Reckless Endangerment while the DUI charge was dismissed.

On September 24, 2018, the trial court revoked Deferred Prosecution based upon the general allegations and plea of guilty in the

217181P matter. CP 99. On October 19, 2018, the defendant, by and through counsel, filed a Motion to Reconsider and Memorandum in Support of the Motion. CP 100-112. The trial court denied the Motion to Reconsider on December 11, 2018 and entered a Judgment and Sentence against the defendant. CP 122-24.

On December 15, 2018, the defendant filed a Notice of Appeal of the trial court Order Revoking Deferred Prosecution. CP 1. After briefing filed by the State and the defendant, oral argument was held in Clark County Superior Court on March 29, 2019. On April 22, 2019, the Superior Court entered a Ruling and Order on RALJ Appeal reversing the trial court's decision revoking deferred prosecution. CP 226-227.

The State sought discretionary review by this Court of the Superior Court's decision. CP 228-231. This Court granted review.

ARGUMENT

RCW 10.05 *et seq.* grants a trial court the authority to revoke or terminate deferred prosecution before the five years following entry of the order of deferred prosecution, regardless of the completion of the two-year treatment program. The Superior Court improperly concluded that RCW 10.05 *et seq.* fails to establish authority of a trial court to revoke a deferred prosecution order based on events occurring after a petitioner has

completed the two-year treatment program. Further, the Superior Court also improperly concluded that the statutory scheme of RCW 10.05 *et seq.*, taken as a whole, is vague and ambiguous regarding the duration of a trial court's authority to revoke a deferred prosecution order. In both instances, the plain language and statutory scheme of RCW 10.05 *et seq.* is unambiguous in the authority it grants to a trial court. RCW 10.05 *et seq.* gives authority to revoke deferred prosecution based on a violation of the order for deferred prosecution.

Questions of statutory interpretation are reviewed *de novo*. *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 454, 219 P.3d 686 (2009). The purpose of statutory interpretation by courts is to determine and give effect to the intent of the legislature. *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013) (*quoting State v. Sweany*, 174 Wn.2d 909, 914 (2012)). The plain meaning of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. *Winebrenner*, 167 Wn.2d at 454. If after examination of a statute, the court finds that it is subject to more than one reasonable interpretation, the statute is ambiguous. *Id.* However, a statute is not ambiguous merely because more than one interpretation is conceivable. *Id.* The Supreme Court presumes the legislature does not use

superfluous words in statute. *Id.* at 457. If after applying rules of statutory construction, a court concludes that a statute is ambiguous, the “rule of lenity” requires court to interpret the statute in favor of the defendant *absent legislative intent to the contrary*; the rule states that an ambiguous criminal statute cannot be interpreted to increase the penalty imposed. *State v. Coucil*, 170 Wn.2d 704, 706-7, 245 P.3d 222 (2010) (emphasis added). A penal statute is strictly construed in favor of a defendant during statutory construction. *State v. Evans*, 177 Wn.2d 192, 193 298 P.3d 724 (2013) (*quoting State v. Hornaday*, 105 Wn.2d 120, 127 (1986)). However, a penal code will be construed adversely against a defendant when the statutory construction clearly establishes the legislature intended such an interpretation. *Id.* (*quoting Winebrenner*, 167 Wn.2d at 462). Further, a reading of a statute that produces absurd results should be avoided because courts presume the legislature does not intend to legislate absurdly. *State v. Engel*, 166 Wn.2d 572, 579, 210 P.3d 1007 (2009).

A. DEFERRED PROSECUTION IS FIVE-YEAR PROGRAM THAT INCLUDES A TWO-YEAR TREATMENT PROGRAM FOLLOWED BY THREE YEARS AFTER SUCCESSFUL COMPLETION OF THE TREATMENT PROGRAM.

There is no specific section that states “Deferred Prosecution is a five-year program,” but looking at the plain language in addition to the context, related provisions, and scheme as a whole, it is clear the deferred

prosecution under RCW 10.05 *et seq.* is a five-year program.¹ Further, during the entirety of the five-years, the trial court maintains authority to revoke or terminate deferred prosecution if the treatment program or other condition is violated.²

a. Plain language under RCW 10.05.020

Under the plain language of RCW 10.05.120, the legislature clearly expressed its intent to establish deferred prosecution as a five-year program. RCW 10.05.120 outlines when a court shall dismiss the charges pending against the petitioner, which is:

Three years after receiving proof of successful completion of the two-year treatment program, and following proof to the court that the petitioner has complied with the conditions imposed by the court following successful completion of the two-year treatment program, but not before five years following entry of the order of deferred prosecution . . .

RCW 10.05.120(1). This section sets out if and when a court must dismiss the pending charges after successfully completing deferred prosecution.

The two conditions that must be satisfied for the court to enter a dismissal:

- (1) proof of successful completion of the two-year treatment program and
- (2) proof to the court that the petitioner has complied with the conditions

¹ Five years is the minimum time a deferred prosecution program will run, but the program can continue longer depending on completion of the treatment program and satisfaction of other conditions. RCW 10.05.120.

² Section B covers the sections in RCW 10.05 that give a trial court authority to terminate deferred prosecution under varying circumstances throughout the five-year program.

imposed by the court *following successful completion* of the two-year treatment program. RCW 10.05.120 also sets out the period for dismissal through deferred prosecution, as “three years after receiving proof” of the two conditions above.

Further, the legislature anticipated early completion of the two-year treatment program, given many petitioners start treatment before entry into deferred prosecution. As such, RCW 10.05.120 does not allow the court to dismiss pending charges “before five years following the entry of the order of deferred prosecution.” Moreover, the court may not dismiss until three years after receiving proof of successful completion of the two-year treatment program *and* conditions imposed by the court following successful completion of the two-year treatment program. The additional conditions that must be met are imposed under RCW 10.05.140.³ As such, RCW 10.05.120 establishes the five-year period based on those conditions – two-year treatment program and three years following proof of completion of treatment.

b. RCW 10.05 *et seq.* as a whole

While there is no specific section under RCW 10.05 *et seq.* that states deferred prosecution is a five-year program, the statute clearly

³ Discussed in detail in section B(iii) – a trial court is permitted to set reasonable conditions through the period of deferred prosecution. The trial court is also given discretion to terminate the deferred prosecution program upon a violation of conditions set in the order. RCW 10.05.140.

details a five-year program when looking to the plain language, the context, the related provisions, and the scheme as a whole. RCW 10.05.150 describes what is required for the two-year treatment program in regards to alcohol treatment. It sets out conditions that must be included to qualify for deferred prosecution. RCW 10.05.140 gives the trial court authority to set various reasonable conditions⁴ throughout the “period of the deferred prosecution.” RCW 10.05.120 establishes if and when a court must dismiss pending charges after successful completion of deferred prosecution.

As discussed previously, RCW 10.05.120 has two conditions that must be met in order for a court to dismiss pending charges. First, the two-year treatment program must be successfully completed. The treatment program has requirements set in RCW 10.05.150, and it requires approval by the court under RCW 10.05.060. These treatment conditions are required for the treatment program to qualify to enter deferred prosecution. Second, the court must also receive proof that the petitioner complied with the conditions imposed by the court *following successful completion* of the two-year treatment program. These conditions are

⁴ Reasonable conditions include, but are not limited to, attendance at self-help recovery support groups for alcoholism or drugs, *complete abstinence* from alcohol and all nonprescribed mind-altering drugs, periodic urinalysis or breath analysis, and *maintaining law-abiding behavior*. RCW 10.05.140. (Emphasis added). These are two conditions Skrobo was alleged to have violated leading to revocation.

separate from conditions in the two-year treatment program, which are permitted and outlined in RCW 10.05.140. If the additional conditions set by the court under RCW 10.05.140 were not separate from the treatment conditions and did not continue to run after completion of treatment, RCW 10.05.140 would become redundant and unnecessary under the statutory scheme and result in a legislative absurdity. As such, it is clear the legislature intended a trial court to have the authority to impose additional conditions following completion of the two-year treatment program under RCW 10.05.140. Further, it would give the court discretion to terminate deferred prosecution upon violation of the deferred prosecution order, keeping in line within the express statutory language as a whole.

c. Legislative intent

The legislative changes to RCW 10.05 *et seq.*, specifically RCW 10.05.120 and RCW 10.05.140, express the intent of the legislature for deferred prosecution to be for a term of five years and to give the trial court authority to impose conditions throughout that time. The legislature has amended RCW 10.05.120 in 1983, 1985, 1994, 1998, and 2003. In the more recent changes in 1998 and 2003, the legislature amended 10.05.120, showing a clear intent to extend the deferred prosecution period to five years.

In 1998, the legislature proposed changes to RCW 10.05.120 that extended the period in which a petitioner must wait after successful completion of treatment before the trial court could dismiss pending charges through deferred prosecution (additions indicated by *text*; deletions indicated by ~~text~~):

~~Upon~~ *Three years after receiving* proof of successful treatment program, *but not before five years following entry of the order of deferred prosecution*, the court shall dismiss the charges pending against the petitioner.

Laws of 1998, ch. 208, § 3.⁵ The legislature amended the section to include three additional years after proof of successful completion of the initial two-year treatment program before the court dismisses pending charges. This change extended the period that a petitioner would be under supervision with the court since the court maintained authority to revoke deferred prosecution under RCW 10.05.140.

Despite this amendment, there were still inconsistencies in the application of trial court authority. As such, the legislature made additional amendments in 2003 to RCW 10.05.120 and RCW 10.05.140. The legislature added language to RCW 10.05.120 that mandated two conditions before permitting dismissal (additions indicated by *text*; deletions indicated by ~~text~~):

⁵ Changes were also made to RCW 10.05.100, which limited Deferred Prosecution to once in a person's lifetime.

(1) Three years after receiving proof of successful completion of the two-year treatment program, ***and following proof to the court that the petitioner has complied with the conditions imposed by the court following successful completion of the two-year treatment program***, but not before five years following entry of the order of deferred prosecution pursuant to a petition brought under RCW 10.05.020(1), the court shall dismiss the charges pending against the petitioner.

Laws of 2003, ch. 220, § 1. Dismissal of pending charges through deferred prosecution now explicitly requires two conditions to be met. The legislature made it clear that conditions after the two-year treatment program may be imposed in addition to the two-year treatment program.

Further, the legislature unambiguously expressed that the trial court has authority to order conditions during the entire five-year period, in addition to the conditions set out in the two-year treatment program when it made changes to RCW 10.05.140. In 2003, the legislature explicitly authorized the trial court to impose additional conditions during the period of deferred prosecution (deletions indicated by ~~text~~):

To help ensure continued sobriety and reduce the likelihood of reoffense, the court may order reasonable conditions during the period of the deferred prosecution including, but not limited to, attendance at self-help recovery support groups for alcoholism or drugs, complete abstinence from alcohol and all nonprescribed mind-altering drugs, periodic urinalysis or breath analysis, and maintaining law-abiding behavior. The court may terminate the deferred prosecution program upon violation of ~~this section~~ the deferred prosecution order.

Id. In Senate session notes, the legislature expressly permitted a court to “order reasonable conditions during the period of Deferred Prosecution including law-abiding behavior.” Washington Senate Bill Report, 2003 Reg. Sess. S.B. 5396, Feb. 7 2003. The amendment specifically addressed the legislature’s concerns of a recent ruling holding that a judge cannot impose conditions beyond the two-year treatment period. *Id.* Further, the changes clarified a trial court’s discretion to terminate deferred prosecution based “upon violation of the deferred prosecution order,” which sets out the additional conditions, if any, that must be followed.

In further discussions, the judiciary committee expressly stated that the statute authorized a court “to impose additional requirements and restrictions on persons who are granted a deferred prosecution” and that in order for dismissal, “the person must show proof not only that he or she has successfully completed the required two-year treatment program, *but also that he or she has complied with any other conditions imposed by the court.*” Washington Senate Bill Report, 2003 Reg. Sess. S.B. 5396, Mar. 20, 2003 (emphasis added). Additionally, the testimony heard by the legislature explained how the amendment to the “bill clarifies the court’s authority to impose conditions during the entire five-year period of deferred prosecution.” Washington Senate Bill Report, 2003 Reg. Sess. S.B. 5396, Apr. 14, 2003. It was determined that most courts had already

assumed conditions may be imposed during the entire five-year period, “but a few have ruled that additional conditions can be imposed only during the two-year treatment program.” *Id.* In short, the amendments clarified (1) a trial court’s authority to set conditions during the entire five-year deferred prosecution period, and (2) a trial court’s authority to revoke if *either* completion of the two-year treatment program or compliance with the trial court’s conditions were not met. Both the Senate and the House unanimously voted in favor of the changes.⁶

Through the amendments in 1998 and 2003, the legislature clarified any ambiguities and expressly stated its intended purpose to grant authority to a district court to impose additional conditions. The legislature further clarified this position in the 2003 changes, explaining that a defendant must complete the two-year treatment program *and* comply with additional conditions imposed by the court in order for the court to dismiss charges through deferred prosecution. This Court should therefore reverse the Superior Court’s conclusion that RCW 10.05 *et seq.* does not establish any authority of the trial court to revoke a deferred prosecution Order based on events occurring after completion of the two-year treatment program. Additionally, this court should reverse the Superior

⁶ The Senate voted 49-0, and the House voted 93-0 to pass the amendments to RCW 10.05.

Court's conclusion that RCW 10.05 *et seq.* is vague and ambiguous as to the duration of the trial court's authority.

- B. A TRIAL COURT HAS AUTHORITY TO TERMINATE A DEFERRED PROSECUTION PROGRAM UNDER RCW 10.05 *ET SEQ.* DURING OR AFTER THE TREATMENT PLAN IF THE PETITIONER VIOLATED A TERM OF THE DEFERRED PROSECUTION ORDER.

Under RCW 10.05 *et seq.*, a trial court has authority to revoke or terminate the deferred prosecution program if a petitioner violates a term of the deferred prosecution order. Specifically, the legislature granted authority to terminate deferred prosecution in three sections: (1) RCW 10.05.090 – Procedure upon breach of treatment plan; (2) RCW 10.05.100 – Conviction of similar offense; and (3) RCW 10.05.140 – Conditions of granting. In each of these sections, the plain language of the statute is clear that a trial court has authority to terminate deferred prosecution if the petitioner violated a condition of the deferred prosecution order.

- a. Under RCW 10.05.090, a trial court has authority to terminate deferred prosecution upon a breach of the ordered treatment plan.

To enter deferred prosecution, a petitioner is given terms or conditions for a treatment plan and conditions for installation of an ignition interlock under RCW 10.05.090. The deferred prosecution treatment program for alcoholism must be for a two-year period and meet the specific requirements set out in RCW 10.05.150. Based upon those

requirements, if the facility, center, institution, or agency administering the treatment finds that the petitioner “fails or neglects to carry out any term or condition,” the agency “shall immediately report such breach to the court, the prosecutor, and the petitioner or petitioner’s attorney of record.” RCW 10.05.090. The trial court then sets a hearing to review the alleged failure to comply with the treatment plan and the court “shall either order that the petitioner continue on the treatment plan or be removed from deferred prosecution.” *Id.* The plain language is clear that the court has authority to allow a petitioner to continue on the treatment plan *or be removed* from deferred prosecution.⁷ As such, the trial court has authority to *terminate deferred prosecution* based on a violation of the treatment plan. In this case, Skrobo completed the two-year treatment program and thus, Skrobo was not subject to review or termination under RCW 10.05.090.

- b. Under RCW 10.05.100, a trial court has authority to terminate deferred prosecution upon conviction of a similar offense.

Under RCW 10.05.100, a petitioner must not be convicted of “a similar offense that was committed while the petitioner was in a deferred

⁷ RCW 10.05.090 refers to a petitioner’s removal from “deferred prosecution.” Throughout RCW 10.05 *et seq.* “deferred prosecution” and “deferred prosecution program” are used interchangeably. RCW 10.05.090 refers to termination while still within the two-year treatment program as defined under RCW 10.05.150 yet it only reads as “deferred prosecution” (rather than “deferred prosecution program”).

prosecution program.” Otherwise, upon notice, the court “*shall remove* the petitioner’s docket from the deferred prosecution file and the court shall enter judgment pursuant to RCW 10.05.020.” The plain language also expressly provides that a trial court has authority to remove a petitioner from deferred prosecution if convicted of a similar offense that was committed while the petitioner was in a deferred prosecution program.⁸ RCW 10.05.100 goes a step further than RCW 10.05.090 as it does not give the court discretion to review and continue treatment, but rather mandates removal from the deferred prosecution program through the use of the phrase “. . . shall remove. . .” Based upon the removal, the court then enters judgment pursuant to RCW 10.05.020, which covers the acknowledgements and waiver of rights a petitioner agrees to at the entry of deferred prosecution.

In this case, Skrobo entered into deferred prosecution in October 2013 for DUI and Reckless Driving. In 2017, after completing the treatment program, but before five years from entry, Skrobo was charged with DUI, Reckless Endangerment, and Hit & Run. Skrobo pleaded guilty to Reckless Endangerment and Hit & Run. Although the trial court has authority to revoke under RCW 10.05.100, Skrobo was not subject to

⁸ “Deferred prosecution program,” as mentioned in footnote 7, is used interchangeably throughout Chapter 10.05. As argued in Section A, the interchangeable use is not in error as deferred prosecution broadly refers to the entire five-year program.

removal or termination because he was not convicted of “a similar offense that was committed while the petitioner was in a deferred prosecution program.”⁹ RCW 10.05.100.

- c. Under RCW 10.05.140, a trial court has authority to terminate deferred prosecution upon a violation of the conditions set in the deferred prosecution order.

As a condition of granting deferred prosecution under RCW 10.05.140 and to help “ensure continued sobriety and reduce the likelihood of re-offense,” the court “may order reasonable conditions during the period of deferred prosecution.” These conditions may include, but are “not limited to, attendance at self-help recovery support groups for alcoholism or drugs, complete abstinence from alcohol and all nonprescribed mind-altering drugs, periodic urinalysis or breath analysis, and maintaining law-abiding behavior.” RCW 10.05.140. Not only does this section permit the court to order additional, reasonable conditions during the period of deferred prosecution, RCW 10.05.140 further grants the court discretion to “terminate the deferred prosecution program upon a violation of the deferred prosecution order,” including any of the additional conditions ordered.

⁹ The trial court in Skrobo’s case did consider the DUI allegations along with Reckless Endangerment and Hit & Run as a similar offense given Skrobo entered deferred prosecution on DUI and Reckless Driving charges. However, a “similar offense” under RCW 10.05.100 may be strictly construed to mean the same offense in deferred prosecution.

Under this section, the legislature made it clear that the trial court has authority to order additional conditions. Further, the trial court has authority to terminate the deferred prosecution based upon a violation of the conditions set out in the deferred prosecution order. Under RCW 10.05.140, it is clear that the additional discretionary conditions ordered by the trial court apply throughout the entire five-year period because the discretionary conditions would be redundant if that were not the case. The Supreme Court has made it clear that the legislature does not use superfluous words in statute. *Winebrenner*, 167 Wn.2d at 457. The minimum necessary alcoholism two-year program requirements are set out in RCW 10.05.150.¹⁰ Some requirements for the two-year treatment period include “[t]otal abstinence from alcohol and all other nonprescribed mind-altering drugs” and “[p]articipation in an alcoholism self-help recovery support group.” RCW 10.05.150(1) and (4). These conditions must be included in the two-year treatment program to comply with the alcoholism program requirements. *Id.* The trial court may also order additional “reasonable conditions during the period of the deferred prosecution.” RCW 10.05.140. The intent of the legislature is evident that these conditions apply to the entire five-year deferred prosecution because construing the language otherwise would render the court ordered

¹⁰ The program requirements under RCW 10.05.150 are non-exhaustive, but it specifies what the treatment program must include.

conditions redundant to the required two-year treatment conditions set under RCW 10.05.150. As such, the legislature intended conditions entered into the deferred prosecution order to apply to the entire five-year deferred prosecution.

When the trial court granted deferred prosecution in this case, it ordered “[t]hat the Defendant shall . . . Maintain total abstinence from alcohol and all other non-prescribed mind-altering drugs during the duration of the Deferred Prosecution” and “[r]emain law abiding for the duration of the Deferred Prosecution.” CP 16-17. Further, the court clearly ordered in its discretion under 10.05.140 that:

If the Defendant fails or neglects to carry out or violates *any terms or condition of* (1) *this order*, or (2) the treatment plan, or (3) violates any rules of such treatment plan resulting in expulsion, the Court shall upon notice of the failure, neglect, or violation, hold a hearing to determine why the Defendant shall not be removed from the Deferred Prosecution Program.

Id. (emphasis added). After Skrobo entered a plea of guilty to Hit & Run and Reckless Endangerment,¹¹ the trial court terminated the deferred prosecution program based on a violation of the order for deferred prosecution requiring Skrobo to “remain law abiding for the duration of

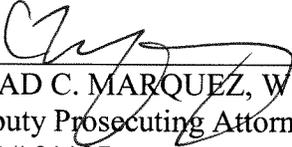
¹¹ The DUI charge was dismissed pursuant to a pre-trial agreement requiring Skrobo to plead to the other two charges. Despite that, there were allegations of alcohol use involved in the incident (not necessarily sufficient to prove DUI). However, the court did consider the alleged failure to maintain total abstinence in its decision to revoke, but the main basis was for violating the condition to remain law abiding. CP 144-145.

the Deferred Prosecution.” CP 145-146. Therefore, this Court should reverse the Superior Court decision because the trial court did have authority to revoke deferred prosecution based on the violation of a condition in the order for deferred prosecution set under RCW 10.05.140.

DATED this 2nd day of December, 2019.

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December 02, 2019 - 2:03 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53408-8
Appellate Court Case Title: State of Washington, Petitioner v. Alem Skrobo, Respondent
Superior Court Case Number: 18-1-03404-3

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