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Court of Appeals
Division II
State of Washington
1/27/2020 4:57 PM
No. 53837-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

ADAM HENDRON

BRIEF OF APPELLANT

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A. Assignments of Error

Assignments of Error

1. The trial court's findings of fact and conclusions of law are inadequate for appellate review.
2. On remand, the trial court should permit contact between Mr. Hendron and his son.

Issues Pertaining to Assignments of Error

1. Should this Court reverse the revocation of Mr. Hendron's SSOSA when the trial court never entered written findings of fact and conclusions of law and the court's oral ruling is grossly inadequate for review?
2. Should this Court order the trial court to permit Mr. Hendron from having contact with his biological son?

B. Statement of Facts

Adam Hendron was originally charged with four counts of rape of a child in the second degree. CP, 1. When he was 21 years old, Mr. Hendron entered into a "romantic relationship" with 13 year old C.R. that eventually became sexual. Supplemental CP, __ (Affidavit of Probable Cause). According to C.R., the two of them had "professed their love for

each other” and Mr. Hendron had “proposed to her and given her a ring.” Supplemental CP, __ (Affidavit of Probable Cause).

Mr. Hendron eventually pleaded guilty to an Amended Information charging him with two counts of rape of a child in the second degree. Supplemental CP, __ (Amended Information). The Court imposed a Special Sex Offender Sentencing Alternative (SSOSA) sentence of 131 months in prison with all but 12 suspended. CP, 9. He was sentenced to community custody for the remainder of his life. CP, 9. As part of his community custody conditions, Mr. Hendron has a general prohibition on contact with minors. CP, 9.

It is fair to say that Mr. Hendron’s SSOSA did not begin well. On February 2, 2009, he commenced his community custody by signing his conditions at the Department of Corrections (DOC). CP, 22. Mr. Hendron finished his twelve month sentence and was released from the Pierce County Jail on May 1, 2009 and reported to DOC the same date. CP, 23. He started sex offender treatment on May 13, 2009. CP, 23. On or about June 16, 2009, he quit attending sex offender treatment. CP, 23. On June 24, 2009, he failed to report to DOC for a scheduled polygraph. CP, 22. Mr. Hendron’s whereabouts were unknown and a warrant was issued for his arrest. CP, 24.

In 2016, Mr. Hendron was discovered living in Mexico. RP¹, 5 (November 18, 2016). The Mexican police extradited him to San Diego, where he was further extradited to Washington. RP, 17 (November 18, 2016). While in Mexico, he met a woman, fell in love, got married, and had a son, J.H.V. RP, 15 (November 18, 2016). After a hearing, the trial court denied the State's motion to revoke the SSOSA. RP, 24 (November 18, 2016). Instead, the court imposed 60 days each for four violations, for a total of 240 days in custody. RP, 24 (November 18, 2016).

Upon his release from jail, Mr. Hendron did significantly better. Mr. Hendron started sex offender treatment with DeWaelche and Associates on March 7, 2017. CP, 32. He obtained housing and employment. CP, 32. Treatment progress reports dated August 2, 2017 and January 24, 2018 showed he was in full compliance with his treatment and community custody conditions. CP, 30, 34.

The January 24, 2018 progress report included a recommendation that Mr. Hendron be allowed to have contact with his son. CP, 36. Mr. Hendron was in compliance with his treatment and community custody conditions. CP, 36. Contact with his minor son would require a modification of his community custody conditions, which included a

¹ References to the Report of Proceedings from the first revocation hearing, occurring on November 18, 2016, are clearly indicated. All other references to the Report of Proceedings refer to the second revocation hearing, occurring on April 12, 2019, May 16, 2019, June 14, 2019, and July 28, 2018, but which are paginated consecutively.

general prohibition on minors. CP, 36. The report recommends supervised contact. CP, 36. Based upon the recommendation, Mr. Hendron brought a motion to modify his community custody conditions. CP, 42. The motion was denied on May 4, 2018 without prejudice pending input from Mr. Hendron's community correction officer and treatment provider. CP, 76.

Mr. Hendron was arrested on January 23, 2019. RP, 49. Although the record does not state this explicitly, it appears DOC was concerned that Mr. Hendron was having unauthorized contact with his minor son. See RP, 19, 64-65, 66. He was arrested after an attempt to polygraph him on this issue resulted in inconclusive results. RP, 49.

On February 6, 2019, the State filed a Petition to revoke Mr. Hendron's SSOSA. CP, 79. On July 26, 2019, this Petition was granted. CP, 113. This Order was timely appealed and is the subject of this appeal. CP, 118.

The State's Petition to Revoke alleged three violations. First, it alleged he failed to comply with a polygraph on January 23, 2019. CP, 82. Second, it alleged he was terminated from treatment. CP, 82. Third, it alleged he failed on January 24, 2019 to "abide by a Department of Corrections directive" by "refusing to provide his telephone password for an approved search." CP, 83. On April 11, 2019, the State filed a

Supplemental Petition alleging a fourth violation: consuming marijuana. CP, 91.

Mr. Hendron denied all four violations and the Court held a lengthy hearing on the violations. Apparently due to witness availability issues, the four day hearing took nearly three months, with testimony taken on April 12, 2019, May 16, 2019, June 14, 2019, and July 28, 2018. The Court heard from five witnesses, including Mr. Hendron.

At the time of the hearing on the SSOSA revocation, Mr. Hendron had been in custody for seven months pending the hearing. RP, 276. Although the remedy sought by the defense is not precisely spelled out, it is clear the defense requested that the Court decline to revoke the SSOSA and permit him to resume treatment, either with Mr. DeWaelache if he was willing or, in the alternative, another qualified treatment provider and to “treat the seven months he’s been a guest in the Pierce County Jail” as a warning. RP, 275-76.

Although Mr. Hendron was charged with improper marijuana use, the State agreed that the Court should not revoke the SSOSA based upon the marijuana use. RP, 252. The Court agreed that it was “not hanging [its] hat” on the alleged marijuana use. RP, 265.

After hearing closing arguments from the parties, the Court took the matter under advisement for a short time, and then resumed the bench

to give its ruling. RP, 280. The Court began by briefly restating the record of what occurred in Mexico and the first revocation hearing. RP, 280-81.

The Court then made the following oral findings:

And after listening to all of the testimony in this case, as disjointed as it has been because we've had to -- actually, I think this is the fourth time you've been in front of me trying to complete this. I do understand Mr. Hendron's been cooling his heels over at the jail since January. But after I review my notes, and given the totality of the evidence, I simply do not believe that Mr. Hendron is going to be successful or be able to sufficiently comply or complete the SSOSA sentence. And it does make me sad, Mr. Hendron, because you have a young child. And I know that child was born during your flight from this country. The violations that we've been discussing today are more than just happenstance. I want to say that I do not believe that missing one day of antianxiety medication, or antidepressant, would lead to the type of reaction that Mr. Hendron purportedly had during the polygraph exam. I also don't believe that it was Officer Johnson's responsibility to go over all of the terms of the SSOSA again with Mr. Hendron. He's had those terms gone over with him numerous times since 2009. So the treatment termination, the failure to comply with the polygraph, the failure to turn over the cell phone password, the totality of all of these things lead me to revoke the SSOSA that was given to Mr. Hendron.

RP, 281-82.

The Court entered an Order Revoking the SSOSA. CP, 113. The Order states: “[T]he court having examined the file and records herein, having read said petition, and hearing testimony in support thereof, and it appearing therefrom that the defendant has, by various acts and deeds, violated the terms and conditions of said sentence and the court being in

all things duly advised, Now, Therefore, IT IS HEREBY ORDERED ADJUDGED and DECREED that the suspended standard range sentence be revoked.” CP, 113-14. The Court also ordered Mr. Hendron could have “phone or email” contact with his biological son “upon approval by the bio mom by email.” CP, 114-15.

As noted, Mr. Hendron contested all four alleged violations. The evidence of each violation is set out below.

Failed to Comply with Polygraph

Mr. Hendron reported to DOC for a polygraph on January 23, 2019. RP, 16. No deception was indicated on the test. RP, 13. According to polygrapher Patrick Seaberg, Mr. Hendron was breathing deeply during the test. RP, 14. After being warned, he “continued to change his answers from ‘no’ to ‘yes’ on the control questions, continued to breath deep.” RP, 16. He was warned “several” times to not breathe heavily. RP, 21. After trying to conduct the polygraph, Mr. Seaberg stopped the test procedure and returned him to his CCO. RP, 16.

CCO Julie Johnson decided to arrest Mr. Hendron for the “inconclusive” polygraph. RP, 49. When she went to arrest him, however, he started to having difficulty breathing and felt lightheaded. RP, 50. He repeatedly said he was having a panic attack and had PTSD. RP, 51. The Tacoma Fire Department was called and did a full medical evaluation of

him. RP, 52-53. Mr. Hendron was transported by ambulance to the emergency room. RP, 56. Mr. Hendron was seen by Physician Assistant Michael Elliot. RP, 186-88. Mr. Hendron's blood pressure, respiratory rate, and heart rate were all elevated. RP, 191. PA Elliot diagnosed anxiety and panic attack. RP, 193.

The controversy revolved around the so-called "control questions." RP, 18. According to Mr. Seaburg, a polygraph is designed to have both control and relevant questions. RP, 11. Both the control questions and relevant questions are worded in such a way to as to produce a negative response. RP, 11.

The first control question was "In the past, do you remember cheating someone who trusted you?" RP, 18. The second control question was, "In the past do you remember making a false entry on a document?" RP, 18. The third control question was, "Have you ever made up a lie to get somebody into trouble?" RP, 18. A dispute arose because the control questions, as asked during the test, do not include any qualifiers, but Mr. Seaberg kept qualifying the questions when the instrument was not operating. For instance, he advised Mr. Hendron that getting someone "into trouble" meant "serious trouble." RP, 28. Likewise, "cheating" referred to something "significant." RP, 30. However, Mr. Seaberg "made

it very clear [he] was not going to use the word 'serious' or 'significant' in the questions once [he] started" the polygraph test. RP, 31-32.

Three relevant questions were asked during the polygraph. The first relevant question was, "Since your last test, have you left Pierce County without permission from your CCO?" RP, 19. The second relevant question was, "Since your last test, have you had any type of contact with your son?" RP, 19. The third relevant question was, "Since your last test, have you accessed the internet on any electronic device?" RP, 19. Mr. Seaburg could not remember how Mr. Hendron answered the relevant questions. RP, 21.

Mr. Hendron testified that he changed his answers to the control questions because Mr. Seaberg kept changing the question. RP, 213. The control questions were such that everyone answering the questions would be required to answer in the affirmative. As Mr. Hendron put it, "He said, 'Have you ever told a lie to get somebody in trouble?' And, I mean, who hasn't, right? And so I said "Yes." And then he stopped the test. And then he said, 'Listen, when I asked you that question. I meant serious trouble.' And so that's different. That, like, you know, getting somebody to lose their job or maybe causing somebody serious problems, and I hadn't done that. So I said 'No.' And then he got really upset." RP, 214.

Regarding the allegation that he was breathing heavily, Mr. Hendron testified he suffers from anxiety and he breathes heavily when he is anxious. RP, 214. He was not trying to hinder the polygraph. RP, 215.

Refusing to Provide Password

The day of Mr. Hendron's arrest, he was advised at the hospital of his rights pursuant to *Miranda*. RP, 114. The next day, CCO Johnson contacted him at the jail. RP, 64. The purpose of the visit was to request the password of his cell phone. RP, 64. CCO Johnson wanted to look for evidence of contact with his son or other minors. RP, 64-65. When CCO Johnson asked for his password, Mr. Hendron answered, "I want my attorney. I need to speak to my attorney." RP, 68. CCO Johnson then said, "Okay, bye," and left. RP, 68.

Mr. Hendron testified he declined to give his password because he believed he had the right to remain silent. RP, 216. This was consistent with the *Miranda* rights that were read to him at the hospital. RP, 216.

The defense submitted written briefing on the issue whether an offender is required to disclose his cell phone password. CP, 95. The defense argued it violated his Fifth Amendment right to remain silent, particularly after he was advised of his *Miranda* warnings. CP, 96, citing *In re Grand Jury Subpoena Duces Tecum*, 670 F.3d 1335 (11th Cir. 2012).

The defense also argued the request for his password violated his Fourth Amendment right to be free from unreasonable searches. CP, 98.

Failure to Complete Treatment

Following Mr. Hendron's arrest, CCO Johnson contacted Mr. DeWaelache. RP, 70. CCO Johnson told him what had happened during the polygraph. RP, 70. She also told him he refused to give his cell phone password. RP, 147. Based upon these two circumstances, he decided to terminate him from treatment. RP, 146-47. He opined, "Based on Mr. Hendron's history of violating court orders and continued unwillingness to cooperate with DOC, he is not amenable to participate in sex offender treatment."

Mr. DeWaelache conceded Mr. Hendron was complying with sex offender treatment for the 22 months prior to his arrest on January 23, 2019. RP, 160. Mr. Hendron testified he was highly motivated to comply with treatment because he wanted to have contact with his son. RP, 205.

Use of Marijuana

During the January 23, 2019 polygraph, Mr. Hendron admitted to using marijuana. RP, 17. Mr. Hendron testified he believed he had permission to use marijuana to combat his anxiety disorder. RP, 211. It appears the trial court did not find this violation, however, and told the parties it was "not hanging [its] hat" on the alleged marijuana use. RP,

265. To the extent the record allows appellate review, it appears this violation was not found by the trial court and this brief does not address it further.

C. Argument

1. The trial court's findings of fact and conclusions of law are inadequate for appellate review.

There are some potentially interesting issues raised by Mr. Hendron's case. It appears the trial court found three violations: failing to comply with a polygraph, being terminated from treatment, and refusing to provide his cell phone password. Each of these violations was contested at the revocation hearing.

Regarding the polygraph, while there was some evidence Mr. Hendron was trying to manipulate the polygraph, there was also evidence that he was confused by the control questions. There was no evidence offered that he tried to manipulate the relevant questions. There was also evidence that he was having a panic or anxiety attack at the time of the polygraph, and that may have affected the results.

DOC Policy 400.360 governs DOC Polygraphs. It begins, "The polygraph is a valuable tool in monitoring offender compliance with conditions established by the court or through a recognized administrative

process. Polygraph examinations will supplement, not substitute, other forms of investigation. No adverse action will be taken solely on the basis of a polygraph examination that indicates deception.” Paragraph B.6.f. states the polygrapher will list the results of the examination as either: NDI=No Deception Indicated), DI=Deception Indicated), Inconclusive=No Opinion, or No Show or Unable to Test. According to CCO Johnson, Mr. Hendron was arrested after the polygraph examination results were listed as “Inconclusive.” RP, 49. Arresting Mr. Hendron for an Inconclusive polygraph examination arguably violates DOC 400.360.

The most interesting legal issue pertains to the cell phone password. After Mr. Hendron was read his *Miranda* rights, he was asked to provide his cell phone password and his response was to ask for a lawyer. Washington has long recognized that a probation officer’s interview of an in-custody offender is protected by the rights to remain silent and to an attorney under the Fifth and Sixth Amendments. *State v. Sargent*, 111 Wn.2d 641, 762 P.2d 1127 (1988); *State v. Willis*, 64 Wn.App. 634, 825 P.2d 357 (1992). At least one court has found that the act of decrypting digital data is sufficiently “testimonial” to provide for Fifth Amendment protection. *In re Grand Jury Subpoena Duces Tecum*, 670 F.3d 1335 (11th Cir. 2012). Whether Mr. Hendron was required to

provide his cell phone password under these circumstances is highly debatable.

The third violation was being terminated from treatment. But the only reason Mr. Hendron was terminated from treatment was because his therapist was told by his CCO that he was non-compliant with treatment. CCO Johnson told Mr. DeWaelache that he attempted to manipulate the polygraph and was non-cooperative with the request for his password, both debatable conclusions. Mr. Hendron had been compliant with his treatment for 22 months and was highly motivated to remain compliant because of his desire to reunite with his son. But for Mr. DeWaelache being told about the polygraph examination and password request, Mr. Hendron would have continued his sex offender treatment as required.

Having said all that, appellate review in this case is impossible. The trial court's oral order is fleeting at best. The Court's oral order simply states, "So the treatment termination, the failure to comply with the polygraph, the failure to turn over the cell phone password, the totality of all of these things lead me to revoke the SSOSA that was given to Mr. Hendron." RP, 282. The written order is even more ambiguous, "[I]t appearing therefrom that the defendant has, by various acts and deeds, violated the terms and conditions of said sentence." CP, 113. To which "various acts and deeds" is the Court

referring? There are no findings of fact or conclusions of law despite the fact the trial court had ample opportunity to enter them. The Court did not resolve any of the contested facts or analyze any of the relevant law, including legal principles that received written briefing from the parties.

Normally in a non-jury trial, written findings of fact and conclusions of law are required. While the degree of particularity required in findings of fact depends on the circumstances of the particular case, they should at least be sufficient to indicate the factual bases for the ultimate conclusions. *In re LaBelle*, 107 Wn.2d 196, 218, 728 P.2d 138 (1986). The purpose of the requirement of findings and conclusions is to ensure the trial judge has dealt fully and properly with all the issues in the case before rendering a decision, and so that the parties involved and the court on appeal may be fully informed as to the bases of his decision when it is made. *Id.* at 218-19. Boilerplate findings of fact are insufficient to permit meaningful appellate review. *Matter of Detention of G.D.*, ___ Wn.App.2d ___, 450 P.3d 668 (2019).

Although written findings are not required for a SSOSA revocation, they are preferred. *State v. Dahl*, 139 Wn.2d 678, 990 P.2d 396 (1999). In *Dahl*, the Supreme Court reversed a SSOSA revocation

in part because there were no written findings of fact and conclusions of law and the trial court's oral decision was ambiguous.

Due process requires that judges articulate the factual basis of the decision. Where the trial judge fails to do so, the decision is not amenable to judicial review. Although oral rulings are permitted, we strongly encourage judges to explain their reasoning in written findings. Such written findings would prevent the unnecessary confusion presented by this case.

Dahl at 689 (citations omitted). The oral and written findings in Mr. Hendron's case are even more ambiguous than those at issue in *Dahl*.

Because the courts oral and written findings of fact and conclusions of law are grossly inadequate for appellate review, the issue of remedy remains. While this Court could remand for written findings, there is recent precedent for simply reversing. *Matter of Detention of G.D.*, ___ Wn.App.2d ___, 450 P.3d 668 (2019); *State v. I.N.A.*, 9 Wn.App.2d 422, 446 P.3d 175 (2019). In *I.N.A.*, the Court criticized the State for failing to obtain timely written findings of fact and reversed in part because of the repeated delays in obtaining the findings for a juvenile sentenced to serve 24 to 32 weeks.

Mr. Hendron has been in custody continuously since January 23, 2019. The trial court entered its revocation order July 26, 2019 after a four day bench trial, testimony from five witnesses, and legal briefing. It was not as if the trial court was confused as to the salient issues. Instead, the trial court failed to provide even the minimal due

process required. This Court should decline to remand for findings. Instead, this Court should reverse the revocation. Mr. Hendron's SSOSA should be reinstated and he should be afforded a reasonable amount of time to find a qualified therapist to resume his treatment.

2. On remand, the trial court should permit contact between Mr. Hendron and his son.

Underlying the facts of this case is the attempt by DOC and the courts to prevent Mr. Hendron from having any contact with his son. The case is somewhat unusual because Mr. Hendron did not have any children at the time his SSOSA was first approved. Mr. Hendron has repeatedly requested to have contact with his son, including filing a motion with the trial court prior to the events of January 23, 2019. The motion properly cited the case of *State v. Letourneau*, 100 Wn.App. 424, 997 P.2d 436 (2000) (prohibition on having contact with offender's biological children must be supported by compelling state interest).

It was a manifest abuse of discretion for the trial court to prohibit all contact between Mr. Hendron and his son. In a recent case, this Court held it an abuse of discretion to impose a blanket prohibition on the right to parent or to refuse to consider whether less restrictive alternatives exist. *State v. Deleon*, 51934-8-II, decided January 22, 2020.

There is no compelling state interest in preventing all contact with Mr. Hendron's son. There are many less restrictive restrictions that would allow contact while simultaneously providing for the safety of the community, including phone contact and supervised contact. At the revocation hearing, the trial court ordered Mr. Hendron could have "phone or email" contact with his biological son "upon approval by the bio mom by email." This order is inadequate.² Mr. Hendron's contact with his son should not be dependent upon the approval of the mother. If the mother is unwilling to voluntarily permit visitation, then Mr. Hendron should be permitted by the trial court and DOC to seek an enforceable parenting plan.

On remand, the trial court should readdress this issue. *State v. Petterson*, 190 Wn.2d 92, 409 P.3d 187 (2018) (trial court retains jurisdiction in SSOSA cases to modify discretionary community custody conditions at any time). While the trial court should retain broad discretion to set reasonable restrictions on the contact, a complete denial of contact is a manifest abuse of discretion.

² Appellate counsel has been advised by Mr. Hendron that he has had no contact with his son since his arrest. Letter dated December 4, 2019.

D. Conclusion

This Court should reverse the revocation of the SSOSA. On remand, Mr. Hendron should be permitted a reasonable period of time to find a qualified sex offender therapist to treat him. Also on remand, the trial court should be required to permit contact between Mr. Hendron and his biological son, with reasonable restrictions.

DATED this 27th day of January, 2020.

A handwritten signature in black ink, appearing to read 'T. E. Weaver', is written over a horizontal line.

Thomas E. Weaver, WSBA #22488
Attorney for Defendant/Appellant

THE LAW OFFICE OF THOMAS E. WEAVER

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)
Plaintiff/Respondent,) DECLARATION OF SERVICE OF BRIEF
) OF APPELLANT
vs.)
)
ADAM HENDRON,)
)
Defendant/Appellant.)

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action.

On January 27, 2020, I e-filed the Brief of Appellant in the above-captioned case with the Washington State Court of Appeals, Division Two; and designated a copy of said document to be sent to Kristie Barham of the Pierce County Prosecuting Attorney's Office via email to: kristie.barham@piercecountywa.gov through the Court of Appeals transmittal system.

On January 27, 2020, I deposited into the U.S. Mail, first class, postage prepaid, a true and correct copy of the Brief of Appellant to the defendant:

Adam Hendron, DOC #323862
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

////

////

1 I declare under penalty of perjury under the laws of the State of Washington that the foregoing is
2 true and correct.

3 DATED: January 27, 2020, at Bremerton, Washington.

4 

5 _____
6 Alisha Freeman

THE LAW OFFICE OF THOMAS E. WEAVER

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