

NO. 28610-0-III

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

STATE OF WASHINGTON,

Respondent,

v.

BRIAN KOHN,

Appellant.

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

The Honorable John M. Antosz, Judge

REPLY BRIEF OF APPELLANT

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A. STATEMENT OF FACTS IN REPLY

In his opening brief, Kohn argued the trial court violated his due process rights when it revoked his SSOSA based on the uncharged allegation he failed to make satisfactory progress in sex offender treatment. Brief of Appellant (BOA) at 22-29. In its response, the state does not dispute it did not allege Kohn's failure to make satisfactory progress in treatment as a basis for revocation. Nevertheless, the state asserts that failure did not violate Kohn's due process rights, because "regardless of which of the alternative grounds for revocation relied upon by the Court," "the facts involved" were "substantially the same." Brief of Respondent (BOR) at 1.

The state concedes Kohn's indeterminate sentence for count 1 on the judgment and sentence (court 2 of the information) is unlawful and should be corrected. BOR at 13.

B. ARGUMENT IN REPLY

THE STATE'S ARGUMENT IN RESPONSE SHOULD BE REJECTED, AS IT CONFLATES TWO SEPARATE DUE PROCESS PROTECTIONS.

The state's argument, as set forth in its issue statement, should be rejected, as it fails to take into account two separate due process rights. An offender facing revocation is entitled to written

notice of the claimed violations, *as well as disclosure of the evidence against him*. State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999). Kohn was given written notice only of violations of certain conditions of his suspended sentence. He was not given notice the state would seek to revoke his sentence on the alternate basis of failure to make satisfactory progress in treatment. His due process right to written notice was violated as a result.

“As a preliminary issue,” the state also “objects to the contents of pages 4 through 6 of Appellant’s brief after the first paragraph of page 4.” Brief of Respondent (BOR) at 2. According to the state, “[n]othing therein other than the fact of the charges and that Appellant was in fact granted a SSOSA is relevant to the matter before this Court.” Id.

Other than offering this conclusory statement, the state cites no authority or factual basis for this Court to disregard the referenced portions of appellant’s brief. Indeed, the referenced portions of appellant’s brief are part of the record and provide context for the court’s grant of a SSOSA in the first instance.

Potentially, a probationer’s entire history on probation is relevant at a revocation hearing, as it may impact the court’s disposition decision. See generally, Morrissey v. Brewer, 408 U.S.

471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); Gagnon v. Scarpelli, 411 U.S. 778, 781, 36 L.Ed.2d 656, 93 S.Ct. 1756 (1973); City v. Lea, 56 Wn. App. 859, 861, 786 P.2d 798 (1990) (while the decision of determining sanctions is committed to the sound discretion of the trial court, the court must first determine that the individual has in fact breached the conditions of probation). And in the interest of full disclosure, Kohn's statement of facts is purposefully over-inclusive, to provide this Court with a comprehensive picture.

Turning to the substance of Kohn's appeal, the state argues that violating the conditions of the suspended sentence is the same as failing to make satisfactory progress in treatment:

The revocation of the SSOSA can be based on either violation of the conditions, or failure to make satisfactory progress. A violation of the conditions must itself be considered a failure to make satisfactory progress, and in fact CCO Clay so testified. RP (10/9/09), 60-61. To take any other position would lead to an absurd result; the conditions mandated or authorized by the legislature are vital to success in treatment. The legislature certainly has the ability to impose such conditions or authorize the Court and/or DOC to do so. To the extent that Appellant might object to the drafting of the statute, "... (t)he due process requirement that a penal statute define a criminal offense with sufficient definiteness does not extend to invalidating statutes which a reviewing court believes could have been drafted with greater precision. Spokane v. Douglass, 115 Wn.2d

171, 179[, 795 P.2d 693] (1990).¹ The same is obviously true of the statute providing for revocation of a SSOSA or similar alternative form of punishment.

BOR at 10. The state's argument should be rejected for several reasons.

First, the state cites no authority for the proposition that "[a] violation of the conditions must itself be considered a failure to make satisfactory progress[.]" Id. (emphasis added). Second, the statute itself belies such a proposition because it clearly lists each as an alternative basis for revocation:

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) (2010). If violating the conditions of the suspended sentence is the same thing as failing to make satisfactory progress in treatment, there would be no reason for the Legislature to distinguish between the two. Obviously, the Legislature intended different meanings, regardless of what CCO Clay thinks. See, e.g., Stone v. Chelan County Sheriff's Dep't, 110 Wn.2d 806, 810, 756 P.2d 736 (1988) (statutes must not be

¹ The state's brief does not provide full case citations. See GR 14(d); RAP 10.4(g).

construed in a manner that renders any portion thereof meaningless or superfluous).

Third, contrary to the state's assertion, "to take any other position" would not lead to an absurd result. It is easy to imagine a scenario where a violation of a condition of the suspended sentence would not also constitute a failure to make satisfactory progress in treatment. Examples might include a probationer's failure to devote time to a specific employment or occupation or his or her failure to pay all legal financial obligations (LFOs). RCW 9.94A.670(6)(b), (e). Under such circumstances, it is possible the probationer is doing quite well in treatment but out of work nonetheless and unable to pay his or her LFOs.

Fourth, Kohn does not object to the drafting of the revocation statute. The statute is clear on its face and sets forth two alternate bases for revocation. It's the state's attempt to conflate the two under a single category that Kohn objects to.

Next, the state asserts Kohn cannot complain of the court's decision to revoke based on his supposed failure to make satisfactory progress in treatment, on grounds Kohn was first to address his progress in treatment.

To assert that the Court could have only revoked the SSOSA in this case when Appellant was on notice of the potential for revocation based on his conduct is illogical, especially where the defense first raised the issue. RP (10/9/10), 70-73; Br. of Appellant 17-19. The Court, during the exchange referenced, in fact stated that the Appellant's progress in treatment was relevant, and did allow Appellant's trial counsel to continue with the line of questioning.

It would be patently unfair, especially in the fact of such overwhelming evidence of the violations alleged, to allow the Appellant to now claim he did not have notice that the State would rely on both grounds for revocation. Not only did Appellant not object to the "failure to make progress in treatment" basis for revocation, he in fact initiated the examination of the risk presented by Appellant. A similar fact pattern in a SSOSA revocation twenty-five years ago properly resulted in the trial court's ruling being upheld. State v. Nelson, 103 Wn.2d 760, 766[, 697 P.2d 579] (1985).

BOR at 10-11.

The problem with the state's argument is that it misunderstands the nature of parole revocation proceedings. The hearing in revocation of parole is a two-step proceeding, which includes a factual determination of a violation and a determination of appropriate sanctions in the event a violation is established. Morrissey v. Brewer, 408 U.S. at 479-80. At the hearing, the probationer must have an opportunity to be heard and to show, if he can, that he did not violate the conditions; *or if he did, that circumstances in mitigation suggest the violation warrants action*

other than revocation. Id. (emphasis added). In this case, Kohn admitted the violations alleged. CP 122. Accordingly, he was attempting to show circumstances in mitigation to suggest the violations warranted action other than revocation. Such circumstances included his low risk to the community.

Whether Kohn opened the door to impeachment or rebuttal evidence regarding his asserted low risk to the community, he did not open the door to an entirely new basis for revocation. The state's argument conflates the two-step process for parole revocation and should be rejected. And contrary to the state's suggestion, it is entirely fair to allow Kohn to present mitigation evidence in the face of overwhelming evidence of the violations alleged. In fact, the constitution allows him to do just that.

Nelson, cited by the state, is inapposite. There, the appellate court considered whether the lower court's reliance on hearsay reports to revoke Nelson's suspended sentence violated his due process rights. Nelson, 103 Wn.2d at 764-66. At the outset, the court noted there is no absolute right to confrontation at revocation hearings. Nelson, 103 Wn.2d at 763 (citing Gagnon v. Scarpelli, 411 U.S. 778, 783 n.5, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973)). Rather, the probationer's right to confront and cross-

examine witnesses must be balanced against any good cause for not allowing confrontation, such as the expense involved and the availability of “demonstrably reliable” hearsay evidence. Nelson, 103 Wn.2d at 764.

In Nelson’s case, the appellate court found that the hearsay evidence relied upon by the court was corroborated and therefore “demonstrably reliable.” Such evidence, in combination with the expense and difficulty in requiring a mental health expert to testify in person at every probation hearing, constituted good cause for allowing the hearsay reports as evidence. Nelson, 103 Wn.2d at 765.

In the next portion of the court’s opinion, relied upon here by the state, the court also found Nelson’s failure to object to the hearsay evidence constituted waiver:

Defendant’s failure to object to a violation of due process and his own use of hearsay during argument constituted a waiver of any right of confrontation and cross examination.

Nelson, at 766.

But the state’s attempt to extend the Nelson court’s waiver analysis to the circumstances here is inept. Kohn presented evidence in mitigation of the admitted violations. He did not accuse

himself of failing to make satisfactory progress in treatment. The state is again conflating the two-step process for revocation proceedings.

While Kohn did not object to the state's sudden assertion of the failure to make satisfactory progress in treatment as an alternate basis for revocation, that failure does not constitute waiver of the right to written notice. The state's violation report submitted in anticipation of the revocation hearing is akin to a charging document. The purpose of both is to provide notice. Failure to object to an inadequate charging document does not constitute waiver of the right to notice. The same should hold true here.

A charging document must include all essential elements of a crime. U.S. Const. amend. VI; Const. art. I, § 22 (amend. 10); State v. Kjorsvik, 117 Wn.2d 93, 108, 812 P.2d 86 (1991). Charging documents that fail to set forth the essential elements of a crime are constitutionally defective. Kjorsvik, 117 Wn.2d at 102. When a charging document is challenged for the first time on appeal, this Court reviews it under a more liberal standard. Kjorsvik, 117 Wn.2d at 105. Under this test, if the missing element

cannot be fairly implied from the language in the information, the conviction will be reversed. Id. at 105-06.

Here, the “missing element” or accusation that Kohn failed to make satisfactory progress in treatment cannot be fairly implied from the language of the violation report. The trial court’s revocation of Kohn’s suspended sentence therefore should be reversed.

Finally, the state asserts that “[a]ssuming without conceding that Appellant is correct when he characterizes the Court’s decision to allow and consider evidence of the failure to make progress in treatment as error,” the revocation should be upheld on grounds Kohn cannot show prejudice. BOR at 11. According to the state, Kohn cannot show prejudice because the lower court could have revoked his suspended sentence based on the violations alone. BOR at 12. The problem is that the court did not revoke based on the violations alone. Instead, the court resolved to “look at whether or not there’s been satisfactory progress.” RP (10/9/09) 157. Concluding there was not, the court revoked Kohn’s SSOSA. Therein lies the prejudice, as it is not clear the court would have revoked without considering the uncharged allegation. See e.g. State v. Ross, 71 Wn. App. 556, 567, 861 P.2d 473, 883 P.2d 329

(1993) (remand not required where there is no doubt the trial court would have imposed the same exceptional sentence based solely on remaining valid factors).

C. CONCLUSION

For the reasons stated herein and in Kohn's opening brief, this Court should remand for a new revocation hearing and to fix the illegal sentence count 1 on the judgment and sentence (court 2 of the information).

Dated this 10th day of November, 2010.

Respectfully submitted,

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