

**FILED**

SEP 15 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

**NO. 28610-0-III**

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**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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**STATE OF WASHINGTON,**

**RESPONDENT,**

**v.**

**BRIAN KOHN,**

**APPELLANT.**

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

**THE HONORABLE JOHN M. ANTOSZ**

---

**RESPONDENT'S BRIEF**

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A. IDENTITY OF RESPONDENT

The State of Washington was the Plaintiff in the Superior Court, and is Respondent herein. The State is represented by the Grant County Prosecutor's Office.

B. RELIEF SOUGHT

The State is asking this Court to affirm the decision of the Superior Court and uphold the revocation of the Appellant's Special Sex Offender Sentencing Alternative (SSOSA).

C. RESPONSE TO APPELLANT'S ISSUES PRESENTED

1. Appellant's due process rights were not violated by the use of alternative grounds for revocation supported by the evidence where the Appellant was on notice that the State sought revocation, and regardless of which of the alternative grounds for revocation relied upon by the Court, the facts involved, notice of which had been provided to the Appellant, are substantially the same. There was no error, and this Court should uphold the trial court on this issue.

As a preliminary issue, the State objects to the contents of pages 4 through 6 of Appellant's brief after the first paragraph of page 4. Nothing 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.

It has long been established in Washington that probation is not a right, but a means of rehabilitation, used within the discretion of the sentencing judge. *State v. Kuhn*, 81 Wn. 2d 648, 650 (1972), citing *State v. Shannon*, 60 Wn. 2d 883 (1962). A probation revocation and a parole violation hearing (apparently under 9.95 RCW, well before enactment of the Sentencing Reform Act, RCW 9.94A) are "comparable." *In Re Application for a Writ of Habeas Corpus of Standee v. Smith*, 83 Wn. 2d 405, 408 (1974); *In Re Peter Harrison Dunham on Habeas Corpus*, 16 Cal. 3d 63, 65, 127 Cal. Rptr. 343, 545 P. 2d 255 (1976). Thus, cases decided in any such setting should be illustrative for the purposes of the instant proceeding.

Due Process does impose some procedural safeguards which must be honored when seeking to revoke probation, but they are not the same as those safeguards which would be mandated in a criminal proceeding. *In re Boone*,

103 Wn. 2d 224, 230 (1984) (citations omitted) (overruled on other grounds, *In re Pierre*, 118 Wn. 2d 321 (1992)). There must be a hearing, which need not be presided over by a judge or lawyer. The probationer is entitled to written notice of the claimed violation; the ability to be heard in person; the ability to present witnesses and other evidence; a neutral hearing body, and written findings by the finder of fact as to the evidence relied upon and reasons for revoking probation. A lack of written findings is not fatal where the trial court has made an adequate oral record of the evidence upon which it relied. *State v. Nelson*, 103 Wn. 2d 760, 767 (1985) (citing *State v. Murray*, 28 Wn. App. 897 (1981)). Unless there is good cause to preclude such confrontation, the probationer must also have the opportunity to cross-examine witnesses. *Black v. Romano*, 71 U.S. 606, 612, 105 S. Ct. 2254, 85 L. Ed. 2d 636 (1985) (citations omitted). Appellant claims his due process rights were violated without actually considering those rights applicable to the proceeding. He did have all of the requisite protections, including especially notice of the claimed violation.

The Judgment and Sentence provided detailed notice of acts which could result in revocation of the SSOSA and imposition of the full sentence.

CP, 61-63. Appellant's characterization of his performance in his treatment, and thus on community custody, minimizes the nature and extent of his actions, actions which are clearly violations of the conditions of suspension. This commences with referring to those violations as "mistakes" (See, for example, Br. of Appellant, at 8, 10). Further, the testimony of Mr. Morris during cross examination differed as to his conclusion regarding Appellant's progress from that presented during his direct testimony.

Q: Mr. Morris, you said sobriety is absolutely crucial to success?

A: Yes, sir.

Q: And did I hear you refer to certain – substances of abuse as disinhibitors?

A: Yes, sir.

Q: Would methamphetamine fit into that category?

A: Yes, sir.

RP (10/9/09), 91.

Following refreshing the witness' memory with regard to one of the letters he had written pertaining to Appellant's progress, the following exchange occurred:

Q: I note that you said denial was a problem at the time; is that correct?

A: Yes, sir.

Q: You also said that was common in the early stages of treatment?

A: Yes, sir.

Q: My impression, pardon me if I'm wrong, is your testimony is now that he's at least intellectually past that denial.

A: Yes, sir.

Q: Now, that would be with regard to his offending behavior directly, is that a fair statement?

A: Yes, sir.

Q: How is that – pardon me. What about denial with regard to the other aspects of his risk behaviors?

A: That's kind of – that's a pretty broad question.

Q: Well, let me simplify it. How about with regard to associating with unsuitable persons?

A: Intellectually, he is very aware of having engaged in that type of behavior in the past. He can verbalize understanding of how and why it is problematic, and he understands how not to get involved in *most* situations now (emphasis added).

Q: You weren't in the courtroom earlier, obviously, when we were establishing the factual basis about Mr. Kohn having used methamphetamine.

A: No, sir.

Q: But you are aware that that allegation had been made?

A: Yes, sir.

Q: And you're aware that he admitted using methamphetamine?

A: Yes, sir.

Q: Can you describe the likelihood of obtaining methamphetamine without associating with unsuitable persons?

A: *Point taken* (emphasis added).

RP (10/9/09), 93-95.

The exchange continued after an imprecise question and sustained objection.

Q: So, in other words, would it be fair to say that one cannot obtain methamphetamine without associating with unsuitable persons?

A: That I believe would be correct, yes.

Q: In this letter of, what do we call it, 20 months ago, roughly, did you not say that your office, and I presume that means you specifically, is willing to give Mr. Kohn one last opportunity to work through his problematic behaviors?

A: Yes, sir.

Q: And you're aware that shortly thereafter there was a violation hearing held in this court in which Mr. Kohn was punished or given feedback by the imposition of 180 days of confinement?

A: Yes, sir.

Q: I will assume for the moment that that hearing and your letter have some overlap. But would you say since then there have been further violations – would it be fair to say you're aware that he's had further violations of DOC supervision requirements?

A: Yes, he has.

Q: And you're aware that these have to do with drug use?

A: Yes, sir.

Q: Specifically allegations of either skipping UA sessions or using and admitting to using methamphetamine?

A: I do not recall the skipping UAs off the top of my head, but I do know about the use of methamphetamines.

Q: I note – that in that letter do you recall a sentence that says “There will be no contact with individuals that Mr. Kohn uses to continue his problematic behaviors”?

A: I would be – I do not recall that specifically, but that probably is correct, yes. That would flow with my line of logic and the expectations for him at that point in time.

Q: If he has used methamphetamine since that time, would it be fair to state that he had violated your treatment directive?

A: Yes.

RP (10/9/09), 95-96.

As Appellant notes, the current statutory language pertaining to the revocation of a SSOSA sentence has been in place for many years with the only changes being in the location at which the provision is codified within the Sentencing Reform Act (Chapter 9.94A RCW). Br. of Appellant, P. 24, n. 10. The language was the same at the time of Appellant's original sentence. Like Appellant, Respondent will refer to the current citation for simplicity's sake.

The Department of Corrections (DOC) is mandated to recommend revocation of the SSOSA under certain conditions.

“If a second violation of the prohibitions or affirmative conditions relating to precursor behaviors or activities imposed under subsection (5)(d) or (8)(b) of this section occurs during community custody, the department shall refer the violation to the court and recommend revocation of the suspended sentence as provided in subsection (11) of this section.”

RCW 9.94A.670(10)(b). Among other “behaviors or activities” prohibited by the Judgment and Sentence was the use of controlled substances except by prescription. CP, at 62. This is similar, if not identical, to the need for sobriety stressed by Mr. Morris in his testimony quoted above.

DOC has previously recommended revocation in this case. CP, at 78 (December 2007); CP, at 95 (March, 2009). In fact, the assigned CCO (Community Corrections Officer), Steven Clay, testified that he believed that the hearing in question was the fifth proceeding since sentencing. RP (10/9/09), 67. Appellant was admonished in Court on at least two occasions in 2009 alone that he could face revocation of the SSOSA. He was arrested on a DOC warrant issued on March 6, 2009, and advised of the basis for the warrant and the possibility of revocation by the Court on March 10, 2009. RP

(3/10/09), at 2-3. The assigned deputy prosecutor also made a record of that possibility on March 20, 2009. RP (3/20/09), at 3.

In relevant portion, RCW 9.94A.670(11) states:

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.

As Appellant admits, the Court did have the discretion to revoke the SSOSA on the basis of the proven violation allegations. Revocation of a suspended sentence is a discretionary decision of the court. *State v. Badger*, 64 Wn. App. 904, 908 (1992). 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 (1990). The same is obviously true of the statute providing for revocation of a SSOSA or similar alternative form of punishment.

The second alternative of failing to make progress in treatment does not require any of the other conditions to be violated; it merely means that regardless of compliance with other statutory conditions of the sentence, an offender may still have their SSOSA revoked and the suspended sentence imposed at any time if progress is not being made in treatment. *State v. Nelson*, 103 Wn. 2d 760 (1985) (decided on other grounds); *State v. Dahl*, 139 Wn. 2d 678 (1999) (decided on other grounds). To assert that the Court could have only revoked the SSOSA in this case when Appellant was on notice of the potential of revocation based on his conduct is illogical, especially where the defense first raised the issue. RP (10/9/09), 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 face 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 (1985).

Assuming 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, it is of no effect, and the revocation of the SSOSA should be upheld. Appellant must show actual prejudice, a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case, to prevail. *State v. Kirkman*, 159 Wn. 2d 918, 935 (2007). The claim of error was not raised in the trial court, not surprising when trial counsel opened the door to the basis upon which the Court decided to revoke the SSOSA. Generally, when a claim of error is not raised in the trial court, it need not be reviewed by the Appellate

Court. *State v. O'Hara*, 167 Wn. 2d 91, 97-98 (2009). To be considered on appeal, a claimed error must be of Constitutional magnitude, and have actually impacted Appellant's rights at trial. *Id.*, at 98. Here, Appellant was on actual notice of the intention to seek revocation, and the factual basis for doing so. There is no question that the Court could have revoked the SSOSA on the basis of the specific violations. Br. of Appellant, at 2. The Court's oral ruling detailed a long history of violations and sanctions, and a finding that the specific violations alleged had been committed. Based upon that finding, the Court stated "(t)hat *alone* would allow the court to order a revocation of the suspended sentence." RP (10/9/09), 157 (emphasis added).

Because the Court found it could revoke on that basis alone, Appellant was not prejudiced. There is a "strong presumption counsel's representation was effective", and the burden is on the defendant to show deficient representation. *State v. McFarland*, 127 Wn. 2d 322, 335 (1995). To prove ineffective assistance of counsel, Petitioner must prove both that that the representation provided was deficient, "... i.e., it fell below an objective standard of reasonableness based on consideration of *all* the circumstances ..." and that prejudice resulted, "... i.e., there is a reasonable probability that,

except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Thomas*, 109 Wn. 2d 222, 225-226 (1987) (emphasis added). "It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object." *State v. O'Hara*, 167 Wn. 2d 91, 100 (2009). In fact, Appellant's trial counsel attempted to show that Appellant did not present a risk, a legitimate strategy apparently directed toward potential sanctions if the violations were found to have been committed. RP (10/9/09), 69-76.

2. Respondent acknowledges that the sentence for a crime must reflect the law in effect at the time of the commission of the offense. In this case, the sentence as to Count 1 as listed on the Judgment and Sentence (Count 2 of the Information) is not valid as it does not in fact reflect the law applicable at the time of the offense. Respondent stipulates to remand for the sole purpose of entering an amended order revoking the SSOSA sentence to reflect the correct sentence as to the offense described in Count 2, and to

conform the numbering of the counts in the Judgment and Sentence and revocation order to the numbering of the counts in the Information.

D. CONCLUSION

The Appellant has not raised any supportable claims of error. He had notice of the claimed violations of his SSOSA. The State did not attempt to proceed on the alternative basis for revocation until Appellant's counsel, for legitimate strategic reasons, began to inquire of the treatment provider as to the risk presented by Appellant, and was forced to consider that option as a result of the Court's inquiries in ruling on the State's objection to the relevance of the line of questioning. Even assuming that there was error, it was not only not objected to, but invited, and had no effect on the decision of the trial court in consideration of the revocation. Accordingly, this Court should uphold the decisions of the trial court and the revocation of

Appellant's SSOSA, but remand for resentencing consistent with the State's concession with regard to the sentencing error.

Respectfully submitted this 14<sup>th</sup> day of September, 2010.

  
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