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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

29426-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LEILANI M. DIMISILLO, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENT OF ERROR

1. The court violated due process by admitting a probation officer's hearsay testimony.

B. ISSUE

1. A probationer obtained consent of her probation officer to travel to Seattle. The consent was later revoked about the time the probationer had planned to begin the trip. Evidence that she was aware of the revocation, as well as how long she remained in Seattle, included numerous hearsay statements of an out-of-court declarant. Absent a finding that the hearsay evidence was reliable and that it would be difficult and expensive to procure the declarant's testimony, did the resulting probation revocation violate due process?

C. STATEMENT OF THE CASE

Leilani Dimisillo and her brother were sexually abused as young children. (RP 105) The abuse included being instructed to engage in sexual contact with each other. (RP 106) In March 2009, when she was sixteen years old, the State charged Leilani with first degree rape of a child

based on sexual activity with her brother that had occurred two years earlier, in January 2007. (CP 1; RP 76) In July 2009, she pleaded guilty to an amended charge of third degree assault with sexual motivation and stipulated to a disposition of 40 weeks based on an allegation of manifest injustice, to be suspended if she was amenable to treatment under the Special Sex Offender Disposition Alternative, RCW 13.41.160 (SSODA). (CP 2-9, 15)

Terry Peterson began treating Leilani in August 2009. (RP 67) During most of the time Leilani was in treatment she was involved with Sterling Tucker, the 22-year-old brother of a friend. (RP 74, 87) Ms. Peterson considered this relationship inappropriate and a distraction from treatment. (RP 76, 86) Leilani recognized that Mr. Tucker was coercive and abusive. (RP 86) Ms. Peterson pointed out that the relationship with Mr. Tucker mimicked much of Leilani's own history of abuse. (RP 89) Leilani's effort to break up with Mr. Tucker led to her becoming involved with drugs and other sexual relationships. (RP 74-75)

One of the difficulties Ms. Peterson encountered in treating Leilani was that Leilani did not have a stable family placement. (RP 70) Ordinarily an important part of treatment is family supervision that offers a supportive and consistent environment and provides reliable information. (RP 71, 79) Leilani had a conflicted relationship with her

mother, who lives in Seattle. (RP 24, 92-94) According to Leilani, her mother had kicked her out of the house when she was 14 years old and her father was in prison. (RP 107)

During the year Leilani was in treatment with Ms. Peterson, she had four different placements. (RP 71) Her first placement was with Alison Hargraves, the mother of a friend. (RP 11; CP 23) Leilani was next placed with her aunt in November, and later with Sterling Tucker's family. (CP 27-28, RP 18) From February until August she lived with a co-worker named Joy Snellman. (RP 21, 109)

Changes in placement were associated with Leilani's regressing, engaging in self-destructive behavior and having difficulties with her relationships. (RP 72) The SSODA disposition included a requirement that Leilani reside where directed by her probation officer or by court order. (CP 17) But according to her probation officer, Priscilla Hannon, the probation department is not involved in finding or recommending a placement for the probationer; Leilani had to find a placement family on her own. (RP 51)

In August 2010, Leilani sought permission from Ms. Hannon to go to Seattle to attend her mother's wedding. (RP 33) About a week later she was arrested for stealing from her employer. (RP 33) Ms. Hannon left a message for Leilani effectively revoking the permission to go to Seattle.

(RP 34) In the ensuing two weeks she did travel to Seattle, where she apparently was again in conflict with her mother. (RP 36-37) Based on information provided by Leilani's mother, on September 2, Ms. Hannon sought a warrant for Leilani's arrest. (RP 39)

Throughout most of the time Leilani was in treatment Ms. Peterson assessed the risk of her reoffending as mild and believed that "she was more likely to be more sabotaging of her own [well being than] she was engaging in any sort of sexual contact with children." (RP 77, 84) Based on information provided to her by Leilani's probation officer, Ms. Peterson ultimately changed her assessment and found that Leilani was at high risk of reoffending. (RP 78)

On September 2, 2010, the State moved for revocation, alleging that Leilani had failed to maintain contact with her probation counselor, to attend sex offender treatment and to comply with curfew. (CP 39-40)

Leilani's probation officer testified at the revocation hearing. (RP 4) Ms. Hannon told the court that, according to Ms. Hargraves, Leilani's placement with her did not work out because Ms. Hargraves had heard that Leilani was having sex with the brother of one of her friends and this was against Ms. Hargrave's religious beliefs. (RP 14) This evidence was admitted over defense counsel's objection. (RP 12-14) Also over defense counsel's objection, Ms. Hannon told the court that according to Mr.

Tucker's mother, Leilani had been in his bedroom, in violation of the rules of the house. (RP 20)

Ms. Hannon was asked to relate a conversation she had with Leilani's mother, Dawn Dimisillo. (RP 35) Defense counsel objected and the court instructed the deputy prosecutor to elicit only enough information to get "a general sense of whether or not and that's the real issue whether or not this young lady has been, was truthful about what she said so." (RP 35) The deputy prosecutor then elicited from Ms. Hannon allegations that Leilani had not been in Seattle at the time she had said, that Leilani was in Seattle on August 31 and September 1, and that problems developed between Leilani and her mother. (RP 36-37) After Ms. Hannon testified that Leilani did not have permission to go to Seattle or to reside with her mother, the deputy prosecutor elicited testimony that, according to Leilani's mother, at the time of this conversation Leilani was no longer at her house and, again over defense counsel's objection, that she did not know where Leilani was. (RP 38) Over objection, Ms. Hannon testified that according to Leilani's mother, Leilani returned to Spokane on September 6. (RP 41)

Ms. Hannon went on to relate that on September 8 she had received a cell phone message from Leilani stating that she was still in Seattle. (RP 41) Over defense counsel's objection, Ms. Hannon testified

that she had received a police report stating the Leilani had been detained on September 8, and thus could have attended her scheduled polygraph examination on September 9. (RP 42-43) During cross-examination, when given an opportunity to review the report, Ms. Hannon acknowledged that this incident actually occurred on September 9. (RP 56)

Next, over repeated objections, Ms. Hannon related information she had received from Tony Johnson, a detention supervisor who had read a letter from Mr. Tucker encouraging her to report an incident involving “an allegation that a, a male, a JC would have done something inappropriate to her.” (RP 42-45) According to Ms. Hannon, Mr. Johnson told her that the detention manager, Mark Lewis, had reported that Leilani denied that she had been mistreated. (RP 45) Ms. Hannon then testified over objection that she had received an incident report from the Juvenile Detention Center alleging that Leilani had been involved in the theft of a cell phone. (RP 45-46)

The trial court found that Leilani had violated the conditions of her probation by failing to report to her probation officer, meet with her treatment provider, or maintain placement; by using drugs and alcohol; and because of criminal referrals to the court. (CP 134) The court

revoked the disposition alternative and ordered Leilani committed to JRA for 40 weeks.

D. ARGUMENT

1. REVOKING A SUSPENDED SENTENCE BASED ON UNRELIABLE HEARSAY ABSENT A FINDING OF GOOD CAUSE VIOLATES DUE PROCESS.

A defendant facing revocation of a suspended sentence has minimal due process rights, including the right to confront and cross-examine witnesses. *State v. Dahl*, 139 Wn.2d 678, 683, 990 P.2d 396 (1999); *see In re Boone*, 103 Wn.2d 224, 230-31, 691 P.2d 964 (1984). The court's consideration of hearsay allegations may violate the defendant's due process right to confrontation of witnesses. *Dahl*, 139 Wn.2d at 687.

Because of the need for flexibility in revocation and modification proceedings, a defendant's right of confrontation may be limited when good cause exists. *See State v. Badger*, 64 Wn. App. 904, 907-08, 827 P.2d 318 (1992). To make a determination that there is good cause to admit hearsay, the trial court must consider the " 'difficulty and expense of procuring witnesses in combination with "demonstrably reliable" or "clearly reliable" evidence.' " *Dahl*, 139 Wn.2d at 686 (*quoting*

State v. Nelson, 103 Wn.2d 760, 765, 697 P.2d 579 (1985)); *see State v. Nelson*, 103 Wn.2d at 763; *Badger*, 64 Wn. App. at 907-08.

“In revocation cases, the harm in erroneously admitting hearsay evidence and thus denying the right to confront witnesses is the possibility that the trial court will rely on unverified evidence in revoking a suspended sentence.” *Dahl*, 139 Wn.2d at 688 (*citing Boone*, 103 Wn.2d at 235). In *Badger*, the court admitted hospital staff reports because the reports were very reliable and because of the difficulty and expense in requiring a mental health therapist to testify in person at every probation hearing.

Allegations that Leilani had violated the conditions of her probation focused on the period following her request to visit Seattle in late August to early September. Evidence that she had ignored the messages from her probation officer and made misrepresentations as to her whereabouts during this time rested almost exclusively on the hearsay related to the Court by Ms. Hannon. Most of those statements came from Leilani’s mother. The record establishes that the mother was able and willing to make a statement to the Court, but the State declined to call her as a witness. (RP 1-3, 62) The record also shows that Leilani’s mother had failed to protect her children from sexual abuse and that she had a conflicted relationship with her daughter. Under these circumstances, her

statements to Ms. Hannon were not clearly reliable and indeed could not reasonably be considered by the court as evidence absent an opportunity for cross-examination.

Ms. Peterson's assessment of Leilani's success in treatment and level of risk to the community was predicated on information she received from Ms. Hannon. The substance of that information was conveyed to the Court through Ms. Hannon's hearsay testimony.

Other hearsay statements, by Leilani's failed placement providers and juvenile detention staff, could have been provided by the declarants with minimal expense or difficulty. All of these individuals resided in the Spokane area; there is no indication the State made any effort to procure their presence at trial. While Ms. Hannon was presumably a reliable witness, no evidence was presented to demonstrate the reliability of Ms. Hargraves and Ms. Tucker. Testimony relating to juvenile detention included hearsay within hearsay, including a third party report of the contents of a letter written by Sterling Tucker. None of this hearsay could be considered demonstrably reliable.

The prosecutor, in response to defense counsel's objections, relied on ER 1101(c) as grounds for admitting hearsay evidence: "The rules [of evidence] need not be applied in the following situations: . . . (3) . . . sentencing, or granting or revoking probation" Defense

counsel reminded the court that constitutional right to confrontation was also implicated. (RP 13) The court nevertheless made no effort to balance Leilani's right to confront and cross-examine witnesses against the cost of procuring those witnesses or the reliability of the hearsay evidence. In short, the court failed to determine that there was good cause to admit the evidence. Admitting hearsay over defense counsel's objection violated the minimal guarantees of due process required in a revocation proceeding.

Violations of the minimal due process right to confrontation are subject to a harmless error analysis. *Dahl*, 139 Wn.2d at 688. "In revocation cases, the harm in erroneously admitting hearsay evidence and thus denying the right to confront witnesses is the possibility that the trial court will rely on unverified evidence in revoking a suspended sentence." *Dahl*, 139 Wn.2d at 688. Thus, harm exists when revocation relies on unreliable hearsay lacking good cause. *Dahl*, 139 Wn.2d at 689.

The grounds for revocation specified by the State were failure to maintain contact, attend treatment and comply with curfew. The allegations were based on Leilani's alleged failure to comply with these requirements after Ms. Hannon revoked consent to the planned trip to Seattle. The evidence as to Leilani's conduct during this time, including whether or when she received Ms. Hannon's message, consisted in large

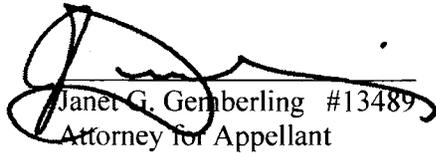
part in the information Ms. Hannon received from Leilani's mother and related to the court.

E. CONCLUSION

The Court failed to find good cause to admit those statements, yet necessarily considered them in determining that Leilani had committed the alleged violations. The resulting revocation violated due process and should be reversed.

Dated this 23rd day of February, 2011.

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Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 29426-9-III
)	
vs.)	CERTIFICATE
)	OF MAILING
LEILANI M. DIMISILLO,)	
)	
Appellant.)	

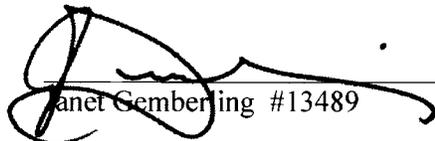
I certify under penalty of perjury under the laws of the State of Washington that on February 23, 2011, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Mark E. Lindsey
mlindsey@spokanecounty.org

I certify under penalty of perjury under the laws of the State of Washington that on February 23, 2011, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on February 23, 2011.


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