

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

---

BRIEF OF RESPONDENT

---

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I.

APPELLANT'S ASSIGNMENT OF ERROR

1. THE COURT VIOLATED DUE PROCESS BY ADMITTING A PROBATION OFFICER'S HEARSAY TESTIMONY.

II.

ISSUES PRESENTED

- A. DID THE TRIAL COURT ERR IN ADMITTING HEARSAY IN THE PROBATION OFFICER'S TESTIMONY?

III.

STATEMENT OF THE CASE

For the purposes of this appeal, the State accepts the defendant's version of the Statement of the Case.

IV.

ARGUMENT

The "bottom line" of the defendant's appeal is the unspoken effort to limit ER 1101 to as narrow an interpretation as possible. It is firmly

established that trial courts are vested with broad discretion in the admission or exclusion of evidence. *State v. Bourgeois*, 133 Wn.2d 389, 400, 945 P.2d 1120 (1997).

Revocation of a suspended sentence rests within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Badger*, 64 Wn. App. 904, 908, 827 P.2d 318 (1992). An abuse of discretion occurs only when the decision of the court is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A revocation hearing such as exists in this case, is not a criminal proceeding. The due process rights afforded a sexual offender facing revocation are not the same as those afforded at the criminal trial. *State v. Dahl*, 139 Wn.2d 678, 682-83, 990 P.2d 396 (1999). The rights that attach in a revocation hearing are:

- (a) written notice of the claimed violations;
- (b) disclosure to the parolee of the evidence against him;
- (c) the opportunity to be heard;
- (d) the right to confront and cross-examine witnesses (unless there is good cause for not allowing confrontation);
- (e) a neutral and detached hearing body; and
- (f) a statement by the court as to the evidence relied upon and the reasons for the revocation.

*Dahl, supra* at 683.

The State disagrees with the defendant's first interpretation that she has a right to confront and cross-examine witnesses. When stated as the defendant states it, without the context and qualifiers, the statement is not entirely correct. As a general principle, ER 1101(c)(3) applies to revocation hearings and a defendant's right to confront and cross-examine witnesses is *limited*. *State v. Anderson*, 33 Wn. App. 517, 519-20, 655 P.2d 1196 (1982); *Dahl, supra* at 686. It may seem like semantics, but the flat statement as put forth by the defendant, conveys the idea that the defendant has the right to confront witnesses, end of story. This is not strictly correct.

In actuality, hearsay testimony is admissible in revocation hearings if the trial court finds the hearsay sufficiently reliable. The production of the witness can be excused by the trial court if the court finds the hearsay to be reliable. *Badger*, 64 Wn. App. at 907-08.

Courts have held that "hearsay evidence from state probation reports is *sufficiently reliable under this test*." *Badger*, 64 Wn. App. at 908 (*citing United States v. Miller*, 514 F.2d 41, 42 (9th Cir.1975)).

Both the probation officer and the treatment provider were called as witnesses and subject to cross-examination. The reports of the probation officer were in evidence. CP 51-126. Therefore, under *Badger*,

hearsay testimony by the probation officer, contained in her reports, was admissible.<sup>1</sup>

It is also worth noting that there is nothing in the record indicating that the defendant made objections to the hearsay in the written probation reports. Yet, the defendant objected vociferously at the hearing. This approach tends to confirm the reliability of the reports and tends to show the multitude of objections at the hearing as tactics. Even so, the defense objections at the revocation hearing did not put the accuracy of the hearsay statements in doubt.

The defendant claims that Ms. Hannon's testimony was, in part, based on what the defendant's mother told her regarding the defendant's trip to Seattle. The defendant also notes that the State's allegations were the failure to maintain contact, attend treatment and comply with curfew.

The trial court's ruling noted as reasons for violation as failure to report as directed to the Court and/or Probation Officer, the use of drugs and alcohol, failure to meet with the treatment provider, failure/inability to maintain placement and criminal referrals to court. Nowhere in that list is a trip to Seattle mentioned as the reason for requesting revocation.

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<sup>1</sup> If anything, the trial court ruled against admitting hearsay at times when the hearsay was admissible.

The defendant emphasizes the Seattle trip, presumably because that focus permits her to couch her appeal in terms of “trial court’s improper use of hearsay.” In fact, the ruling of the trial court did not mention facts based on the alleged hearsay from the defendant’s mother.

The trial court revoked the SSODA for the following reasons: the use of drugs and alcohol. That is a simple, fact-based allegation with nothing of hearsay in the record. The failure to meet with treatment provider was another straightforward, finding that did not use hearsay for support. The failure to maintain placement was well known to both the treatment provider and to the Corrections Officer. Of course, the finding of criminal referrals was something that the trial court need only flip a few pages to find. Lastly, the defendant’s failure to report to the Court and/or Probation Officer was a fact known to the Probation Officer. The defendant has not shown a connection between the Seattle trip and the trial court’s findings.

Even if this court finds that the trial court erred regarding the trip to Seattle by defendant, excising that data does not remove the other reasons the trial court revoked the SSODA. The trial court’s decision should be affirmed.

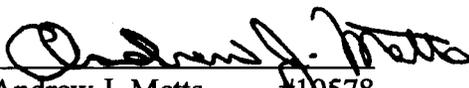
V.

CONCLUSION

For the reasons stated, the revocation of the SSODA should be affirmed.

Dated this 20<sup>th</sup> day of April, 2011.

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