

FILED
APR 24, 2014
Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 32144-4-III

STATE OF WASHINGTON, Respondent,

v.

KEVIN BRYCE SNOW, Appellant.

APPELLANT'S BRIEF

Elizabeth Halls, WSBA #32291
Burkhart & Burkhart, PLLC
6 ½ N. 2nd Avenue, Suite 200
PO Box 946
Walla Walla, WA 99362
Tel: (509) 529-0630
Fax: (509) 525-0630
Attorney for Appellant

TABLE OF CONTENTS

AUTHORITIES CITED.....ii

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR.....2

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR2

IV. STATEMENT OF THE CASE.....3

V. ARGUMENT.....4

A. The trial court erred because Snow was denied due process protections during the drug court termination proceeding.....13

 1. Snow was constitutionally entitled to due process in drug court.....13

 2. The trial court violated Snow’s right to due process of law by terminating him from the drug court program.....19

 3. The record fails to indicate that Snow was provided with sufficient notice to inform him of the specific drug court obligations he allegedly violated.....19

 4. Snow’s right to confrontation was violated where the only “evidence” of violations were allegations from the treatment provider based on hearsay.....21

 5. Due process requires a finding of “good cause” be expressed on the record and be based on evidence in the record before denying the right to confrontation.....23

 6. Reliability must be determined by an examination of the circumstances surrounding each hearsay statement offered at a termination hearing.....25

 7. The State failed to prove the violation by a preponderance of the evidence.....28

 8. The error was not harmless.....29

VI. CONCLUSION.....31

CERTIFICATE OF SERVICE33

AUTHORITIES CITED

Federal Cases

<i>Crawford v. Washington</i> , 541 U.S.36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).....	27
<i>Morrissey v. Brewer</i> , 408 U.S. 471, 33 L.Ed.2d 484, 92 S.Ct. 2593 (1972).....	15, 16, 18, 19, 21, 24
<i>Ohio v. Roberts</i> , 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).....	26
<i>United States v. Bell</i> , 785 F.2d 640 (8 th Cir. 1986)	22, 26
<i>United States v. Comito</i> , 177 F.3d 1166 (9 th Cir. 1999).....	22, 23
<i>United States v. Hicks</i> , 693 F.2d 32 (5 th Cir. 1982), <i>cert. denied</i> , 459 U.S. 1220, 103 S.Ct. 1226, 75 L.Ed.2d 461 (1983).....	17, 18
<i>United States v. Martin</i> , 984 F.2d 308 (9 th Cir. 1993).	22
<i>United States v. Olano</i> , 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).....	23
<i>United States v. Penn</i> , 721 F.2d 762 (11 th Cir. 1983).....	26

State Cases

<i>In re McNeal</i> , 99 Wn.App. 617, 994 P.2d 890 (2000).....	19
<i>In re Personal Restraint of Boone</i> , 103 Wn.2d 224, 691 P.2d 964 (1984), <i>overturned on other grounds, In re the Personal Restraint of St. Pierre</i> , 118 Wn.2d 321, 833 P.2d 492 (1992).....	16
<i>In re Ross</i> , 114 Wn.App. 113, 56 P.3d 602 (2002).....	15
<i>State v. Billie</i> , 132 Wn.2d 484, 939 P.2d 691 (1997).....	15
<i>State v. Cassill-Skilton</i> , 122 Wn.App. 652, 94 P.3d 407 (2004).....	14, 15, 17-20, 28, 29, 31
<i>See State v. Dahl</i> , 139 Wn.2d 678, 990 P.2d 396 (1999).....	16, 21, 22, 29, 30
<i>State v. Golden</i> , 112 Wn.App. 68, 47 P.3d 587 (2002).....	14
<i>State v. Little</i> , 116 Wn.App. 346, 66 P.3d 1099, <i>review denied</i> , 150 Wn.2d 1019, 81 P.3d 119 (2003).....	13
<i>State v. Marino</i> , 100 Wn.2d 719, 674 P.2d 171 (1984).....	14, 16, 17-19, 28

State v. Nelson, 103 Wn.2d 760, 697 P.2d 579 (1985).....16, 21, 26, 30

State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984).....25

State v. Stevens, 58 Wn.App. 478, 794 P.2d 38 (1990).....25

State v. Varnell, 137 Wn.App. 925, 155 P.3d 971 (2007).....18

State v. Ziegenfuss, 118 Wn.App. 110, 74 P.3d 1205 (2003)19, 21

Statutes

RCW 2.28.170.....13

RCW 2.28.170(2).....13, 14

RCW 10.05.090.....20

RCW 13.04.021(1).....13

I. INTRODUCTION

Kevin Bryce Snow entered in to the Spokane County Drug Court Program which would allow his charges of second degree theft and two counts of trafficking in stolen property to be dismissed following successful graduation from the program. As part of the agreement, Snow agreed to abide by the treatment plan as developed by the drug court treatment provider, including participation in AA/NA meetings, acquiring a sponsor, taking UAs as required, attend treatment, attend all court hearings, and commit no new criminal law violations. At the drug court termination hearing, the court determined that Snow violated his drug court agreement when he provided two diluted urinalysis test results. The court terminated Snow from drug court, found Snow guilty of the charges based on submitted police reports, and sentenced him to a prison based DOSA.

On appeal, Snow contends that the his due process rights were violated because: (1) he was not given sufficient notice informing him of the specific drug court obligations he allegedly violated; (2) his right to confrontation was violated where the only evidence of any violation was based on hearsay; (3) and the State failed to meet its burden of proving the violation by a preponderance of the evidence. As a result of the due process violations, Snow's judgment and sentence should be vacated and

the case remanded so that Snow can continue participating in the drug court program.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred because Snow was denied due process protections during the drug court termination proceeding.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Whether Snow was constitutionally entitled to due process in drug court.

ISSUE 2: Whether the trial court violated Snow's right to due process of law by terminating him from the drug court program.

ISSUE 3: Whether the record fails to indicate that Snow was provided with sufficient notice to inform him of the specific drug court obligations he allegedly violated.

ISSUE 4: Whether Snow's right to confrontation was violated where the only "evidence" of violations were allegations from the treatment provider based on hearsay.

ISSUE 5: Whether due process requires a finding of “good cause” be expressed on the record and be based on evidence in the record before denying the right to confrontation.

ISSUE 6: Whether reliability must be determined by an examination of the circumstances surrounding each hearsay statement offered at a termination hearing.

ISSUE 7: Whether the State failed to prove the violation by a preponderance of the evidence.

ISSUE 8: Whether the error was not harmless.

IV. STATEMENT OF THE CASE

On February 19, 2013, the Spokane County prosecutor filed an information charging Snow with one count of second degree theft other than a firearm and two counts of trafficking in stolen property in the first degree. CP 1-2. These charges were based on two paint sprayers that Snow had stolen from his employer in Spokane, Washington, between August 18, 2012 and December 1, 2012, and then pawned. CP 3-4.

On April 4, 2013, Snow appeared in Drug Court and expressed an interest in participating in the Drug Court Program. CP 5-6; RP 3-6. The trial court ordered that Snow be released from custody on April 8, 2013 to

engage for intake, drug testing, early engagement treatment groups, and schedule an evaluation at North East Washington Treatment Alternatives (“NEWTA”), a treatment provider for the Spokane County Drug Court Program. CP 5-6.

On April 25, 2013, Snow agreed to enter the drug court program, which would allow for the charges to be dismissed following Snow’s successful graduation from the program. CP 7-10. Snow was also required to pay restitution in the amount of \$650.00. CP 11. As part of the agreement, Snow waived his right to a jury trial and agreed that—in the event of termination from the program—the court could decide his guilt based solely on the information in the police reports, such as the affidavit for determination of probable cause. CP 7-10.

Pursuant to the agreement, Snow agreed to abide by the treatment plan as developed by the NEWTA treatment provider and complete the Drug Court Personal Recovery Program, including participation in AA/NA meetings and acquiring a sponsor. CP 7. Snow agreed

that any failure of the treatment program, including by not limited to positive urinalysis tests, missing treatment, violation of release conditions, commission of a new crime, may result in modification of the treatment program and/or release conditions, revocations of [his] release, and/or termination from the program.

CP 8. Snow also agreed to commit no law violations, not use or possess any non-prescribed substance(s), and not use alcohol. CP 8. In addition,

Snow could be terminated from the Drug Court Program for any of the following: (1) failure to attend court hearings or abide court orders; (2) repeated failure to attend treatment sessions; (3) repeated positive urinalysis / breath analysis tests; falsifying or tampering with UA samples; (4) re-arrest during the treatment program; and/or any circumstance necessitating the issuance of a bench warrant; and (5) inability of the defendant to regularly participate in treatment, testing (UA/BA) and/or review hearings with the Court. CP 9. The termination policy also states that the above list is not exclusive. CP 9.

On June 6, 2013, the court imposed sanctions against Snow for violating the conditions of his participation in the Drug Court Program. CP 12-14. At that time, Snow was ordered to serve in partial confinement at Geiger Corrections Center and follow all of Geiger's rules, policies, and procedures. CP 13. Snow was also ordered to continue in his treatment and participate in his Drug Court program, perform 104 hours of community service, and seek Department of Corrections ("DOC") approved housing. CP 14.

On August 9, 2013, the court issued a bench warrant for Snow's arrest for failing to appear for a drug court hearing on August 8, 2013. CP 16-17. On September 3, 2013, the court again imposed sanctions against Snow for violating conditions of his participation in the Drug Court

Program. CP 18-20. At that time, the court ordered Snow to serve on Work Crew in partial confinement at Geiger Correction Center, follow all of Geiger's rules, policies, and procedures, continue participating in Drug Court testing, treatment, AA/NA meetings, men's group and/or Creative Arts as possible. CP 19-20. The court also ordered Snow to perform up to 40 hours of community service, be assessed for inpatient treatment, and do community service hours for two weeks before returning to treatment. CP 20. On September 11, 2013, the court entered an order allowing Snow to begin Drug Court treatment attendance on September 13, 2013 based on Snow not being referred to inpatient treatment and all community service hours being completed. CP 21.

On September 25, 2013, the court ordered Snow transferred from Geiger Correction Center to the Spokane County Jail pending a Drug Court termination hearing. CP 22. All of Snow's Drug Court review hearings were not recorded, so there is no verbatim report of proceedings for those weekly review hearings in the record. In addition, the record contains no written motions filed by the State alleging Snow violated any conditions of his drug court program.

At the Drug Court termination hearing on October 25, 2013, the court recited a brief historical background describing that Snow had some

difficulties with Drug Court early on. RP 13. The court stated the following:

... We had some difficulties early on, and I will describe those. He had a stall test – excuse me – a positive on 4/26 and a no show on 5/22. He did attend treatment the first couple weeks he was with us. He completed DOC orientation. He came back on 5/6 – excuse me – 5/6 there was a stall. 5/8 was a no show for a drug test. 5/15 and 5/16 were positives. Came back on 5/16 for a review hearing, and on that date I noted he missed treatment on 5/1, 5/3 and 5/8.

He expressed to us some transportation issues. He had not kept his work crew appointment. There was some difficulty with contacting DOC. And we talked about the fact that he had to be more compliant. He then had a negative drug test on May 20th. And he attended all of his treatment, and appeared to be engaged in Drug Court at that point, although he missed his work crew orientation the day before court. We reset this matter for a review hearing two weeks out, as is our normal course, our practice.

He had a stall on 5/29. A no show on 5/30. A positive on 6/5. Missed treatment on 5/29 and 5/31. He missed a one-on-one on 5/21 and 5/23. When he came in on 6/6, I had him sent to the jail and then off to Geiger. By then he had accumulated 104 hours of community service.

We also had some concern about his housing, only because we couldn't verify everyone who was there in terms of who they were. That was really a secondary issue.

He was in jail for six days. He went to Geiger on 6/12. He was in Geiger until July 18th, so over a month; 36 days if my math is correct, roughly. He was released on July 18th. And he completed his community service hours by that point in time, and he was placed back into the program.

He missed a drug test on 7/23, but was negative on 7/25. He came back to court on 7/25. He attended treatment.

We of course moved forward. It is our practice to continue to work with folks.

And on 7/26 unfortunately he had another stall. A positive on 8/1. A no show on 8/7. He was not in court at the scheduled review date of 8/8. He missed treatment on 7/24, 7/29, and 8/8. And because he did not appear on 8/8, I had a warrant issued, or I requested the state to give me a warrant. And then that warrant went into the system.

And Mr. Snow was arrested within about ten days; I believe he was arrested on August 17th. And we held a hearing on 8/28, and left Mr. Snow in Drug Court; we gave him another opportunity, you would say. And I believe we had a talk about being compliant and what was expected, and the fact that we had been through this one time before.

He was in jail for several days. He was transported out to Geiger to recommence. We did have an assessment done for inpatient. We did offer that service. And the recommendation was not – was no inpatient at that time, so we restarted treatment again, and assigned him to find Oxford housing this time.

He had started at Geiger I believe on 9/3. It took about two weeks to get out to Geiger because, again, we had a hearing and all the rest of the things; so, two, three weeks. Then he was out at Geiger, as I recall.

I could be wrong about those dates, and you can all correct me, but this is what I am trying to read.

He was due to be released I believe on 9/25. And that was actually on a docket I wasn't present for; I was gone; that was being covered by another judge.

On that date we were notified in staffing that Geiger had taken samples, UA samples, on 9/9 and 9/12, and both had come back as dilute, so those were sent off for testing or to – had been tested in a lab. And based upon our protocol, which is to set folks for termination when we have dilutes, we set it for termination. And that was a month ago, essentially; it is now 10/23....

RP 13-16.

Next, the court asked the State if it had a motion or request. RP 18. The deputy prosecuting attorney responded that Mr. McBride on behalf of NEWTA was requesting the defendant be terminated from the program and the State concurred with that recommendation. RP 18.

Defense counsel objected to NEWTA's recommendation and the State's recommendation. RP 19. Defense counsel responded that Snow had completed the 40 hours of community service hours, and he had housing lined up at Oxford Housing when he came to court on September 25, when the court was on vacation. RP 19. According to defense counsel, he had received emails "from Ms. Cunningham at Geiger that there were two dilute UAs provided." RP 19. Defense also indicated that there were a lot of reasons dilute UAs can come up: although some can be on purpose, a person can unknowingly drink too many fluids in a day and provide a dilute UA specimen. RP 19-22. Defense counsel pointed out that while Snow was at Geiger serving a sanction for drug court, he had been on a work crew at the fairgrounds finishing up his community service hours. RP 20. Snow had no indication when he would be tested by Geiger. RP 20. Snow was not calling in for UA testing, instead Geiger determined the timing of UA testing. RP 20. The first UA testing was at

11:40 p.m., when Snow was sleeping. RP 20. Snow had been awakened from his sleep to provide his sample. RP 20. The next one on September 11 was around 7:40 p.m. RP 20. Defense counsel recommended that Snow be allowed to continue in Drug Court. RP 22.

Next, Mr. McBride with NEWTA commented that Snow was still struggling in his progression with Drug Court. RP 24. McBride indicated that the reason requested the termination hearing was because of the dilutes, which he considered evidence of deception under the protocol. RP 25. Then McBride told the court about a grievance Snow filed with Geiger on September 6 for a September 5 incident, in which Snow claimed the officer was trying to set him up. RP 25. According to McBride, the officer responded to that incident saying, “You said that you were...told not to touch the sink while you were in the bathroom, attempting to provide a sample, when you stuck your hand down the sink and tried to get water, that, again, gave the appearance you were trying to manipulate the test by obtaining water to dilute your sample.” RP 26. Then McBride said four days after that incident, they got the first dilute, then a couple days after that, a second dilute. RP 26. The samples McBride checked on were considered two “valid samples” that went through the chain of custody. RP 26. Based on the two valid samples of

the diluted UAs, McBride was recommending that Snow be terminated from the Drug Court Program. RP 27.

Lastly, Snow responded to the court about how he had not given up and how much he wants to stay in the program. RP 29-34.

After hearing from the parties, the court stated the following:

....The question is, can I leave you in this program.

No question you had a difficult time when you got here. That's okay. We always deal with those things. You went to Geiger. You came back out. And quite frankly...the concern for me is, I really only had you back in the program for about three weeks; maybe less. You came out on July 18th – so it was probably two to three weeks into early August... You tested on 8/1; it was positive. You no showed on 8/7. 8/8 you weren't in court. I issued a warrant....But because we picked up on the warrant in a short time, in some sense you are fortunate because of that, we held a hearing on 8/28 and I left you in...

You did tow the line, Mr. Snow. In a lot of ways you did tow the line... You did your community service hours.

Why is a dilute a problem for us? It's not because in any one particular case – Well, why is a dilute a problem for us? It is a problem because historically what it tells us is, that 99 percent of the time someone is masking drug use. That's what it tells us. I agree, there are times when that doesn't happen. But the reason we take it so dang seriously, it is a terminable offense, if you want to call it that, because for us it masks drug use.

Why is it important? It is important because the only way people are truly in recovery – and you know this better than anyone in the courtroom – is if you are honest...

So when we have this come up for us, it is not about Kevin Snow, it's about what does that test mean for our program....

But the thing of it is, I had you here in court, and I gave you an opportunity to stay in, provided there weren't any further problems. What I get is two lab-confirmed dilutes... Your response, is, it was just an accident. Fair enough...

I'm not calling you a liar. I can't do that. I'm telling you what the program requirements are, and where we were from the 28th of August, where that line was and how close we were then, and the fact that I said, let's continue....

RP 35-39. The court then terminated Snow from the Drug Court program.

RP 40.

On December 11, 2013, the court entered an order terminating Snow from Drug Court, finding: (1) failure to attend court hearings or abide by court orders; (2) repeated failure to attend NEWTA sessions for treatment and testing: treatment "stated on the record on 10-23-13," UAs/BAs "stated on the record on 10-23-13"; (3) any circumstance necessitating the issuance of a bench warrant; (4) immediate sanctions and incentives were tried and unsuccessful: Community service hours on work crew or volunteer, Greiger Correction Center, Work Crew; and (5) dilute samples at Geiger. CP 24-25.

In addition, the court found Snow guilty of the crimes charged based on the probable cause statement and submitted police reports. RP 43-49. The court sentenced Snow to a Prison-Based Alternative DOSA sentence to 13 months confinement and 13 months in community custody on count 1, and 37 months of total confinement and 37 months in

community custody on both counts 2 and 3, all to be served concurrently.

CP 28-41; RP 49-54.

Snow timely appeals, following the entry of his judgment and sentence.

V. ARGUMENT

A. THE TRIAL COURT ERRED BECAUSE SNOW WAS DENIED DUE PROCESS PROTECTIONS DURING THE DRUG COURT TERMINATION PROCEEDING

1. Snow was constitutionally entitled to due process in drug court.

In 1999, the legislature enacted RCW 2.28.170 to provide counties with the opportunity to create drug courts in order to reduce recidivism and assist courts through the diversion of potential offenders away from “the normal course of criminal trial proceedings.” *State v. Little*, 116 Wn.App. 346, 351, 66 P.3d 1099, *review denied*, 150 Wn.2d 1019, 81 P.3d 119 (2003) (quoting Laws of 1999, ch. 197, section 7). In *Little*, the Court of Appeals acknowledged that drug court resembles deferred prosecution under chapter 10.05 RCW. *Little*, 116 Wn.App. at 351.

Although it “resembles” deferred prosecutions, the Legislature created “drug court” as a “court that has special calendars or dockets” for particular purposes. RCW 2.28.170(2). In effect, drug court, like juvenile court, is “a division of the superior court,” RCW 13.04.021(1), charged with the responsibility to adjudicate specified cases. Therefore, drug court

is not simply a contract between defendant and prosecutor; rather, in “a diversion arrangement, the prosecutor establishes the conditions and supervises the program,” and the court’s role is limited merely to “assuring procedural regularity.” *State v. Marino*, 100 Wn.2d 719, 724, 674 P.2d 171 (1984). By contrast, drug court expressly requires “early, continuous, and intense judicially supervised treatment.” RCW 2.28.170(2). While the statute authorizes the creation of drug courts, it contains no provision for operating the program. *State v. Cassill-Skilton*, 122 Wn.App. 652, 658, 94 P.3d 407 (2004).

The intensive judicial supervision makes drug court more than a diversion agreement. Unlike diversion, where the court is merely a referee of procedural regularity, a drug court judge must actively and substantially participate in every step of the adjudicatory process. *State v. Cassill-Skilton*, 122 Wn.App. at 658 (noting “significant distinctions” between “diversion agreement” and drug court due to “the required intense judicially supervised treatment”).

By creating drug court as a court requiring intensive judicial supervision, the Legislature invoked the judicial power and duty “to hear and determine a cause or proceeding.” *State v. Golden*, 112 Wn.App. 68, 72, 47 P.3d 587 (2002). The supervision mandated by statute requires the court to exercise its inherent powers to manage dockets, continue cases,

impose conditions of release, and supervise defendants on release. *See e.g., State v. Billie*, 132 Wn.2d 484, 490, 939 P.2d 691 (1997) (decisions on pretrial release are essential “functions of the judiciary”).

As a systemic mode of adjudication, drug court requires ongoing judicial participation. The court holds hearings at regular intervals to hold participants accountable to the court, and the judge plays a key motivational role, praising success and meting out sanctions for program failure. *Cassill-Skilton*, 122 Wn.App. at 659 (Van Deren, J. concurring) (citing Honorable Ricardo S. Martinez, *Drug Courts: An Innovative Approach to Drug-Related Crime*, Wash. State Bar News, November 1997).

In addition, “[d]ue process requires the government to treat its citizens in a fundamentally fair manner. The purpose of due process of law is to protect the individual from the arbitrary exercise of government powers.” *In re Ross*, 114 Wn.App. 113, 121, 56 P.3d 602 (2002). The United States Supreme Court has held that before a court can revoke an individual’s parole, the court must provide minimal due process protections. *Morrissey v. Brewer*, 408 U.S. 471, 482-84, 33 L.Ed.2d 484, 92 S.Ct. 2593 (1972). At a minimum, the defendant is entitled to:

- (a) written notice of the claimed violations of parole;
- (b) disclosure to the parolee of evidence against him;

- (c) opportunity to be heard in person and to present witnesses and documentary evidence;
- (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);
- (e) a “neutral and detached” hearing body...; and
- (f) a written statement by the factfinders as to the evidence relied upon and the reasons for revoking parole.

Morrissey, 408 U.S. at 488-89. These requirements serve to “assure that the finding of a parole violation will be based on *verified facts* and that the exercise of discretion will be informed by an accurate knowledge of the parolee’s behavior.” *Id.* at 484.

While *Morrissey* concerned the procedures for revoking parole, the holding of the case has also been applied to SSOSA revocation, revocation of pretrial diversion agreements, and probation hearings as well. See *State v. Dahl*, 139 Wn.2d 678, 683-84, 990 P.2d 396 (1999); *State v. Nelson*, 103 Wn.2d 760, 697 P.2d 579 (1985); *In re Personal Restraint of Boone*, 103 Wn.2d 224, 230-33, 691 P.2d 964 (1984), *overturned on other grounds*, *In re the Personal Restraint of St. Pierre*, 118 Wn.2d 321, 328, 833 P.2d 492 (1992); *Marino*, 100 Wn.2d at 724-25 (holding that although

two factors distinguish probation revocation from pretrial diversion termination, the rights at stake at pretrial diversion termination agreements are similar to those involved at probation revocation).

In determining what process is due for drug court terminations, the *Cassill-Skilton* court therefore looked to the Supreme Court's decision in *State v. Marino*, 100 Wn.2d 719, 725, 674 P.2d 171 (1984), because it addressed pretrial diversion decisions regarding termination. *Cassill-Skilton*, 122 Wn.App. at 656. In *Marino*, the court held:

[T]he burden is on the State to prove noncompliance with the agreement by a preponderance of the evidence. These cases conclude that because important constitutional rights have been waived, the accused is entitled to judicial enforcement to the terms of the agreement.

Marino, 100 Wn.2d at 725 (citing *inter alia*, *United States v. Hicks*, 693 F.2d 32, 34-35 (5th Cir. 1982), *cert. denied*, 459 U.S. 1220, 103 S.Ct. 1226, 75 L.Ed.2d 461 (1983)).

The similar rights at stake in probation revocation, plea bargain agreements and pretrial diversions persuaded the *Cassill-Skilton* court that drug court participants are entitled to have factual disputes resolved by a neutral fact finder. This includes an independent determination that the drug court agreement was violated, by a preponderance of the evidence with the burden of proof on the State. *Cassill-Skilton*, 122 Wn.App. at

656; *Hicks*, 693 W.2d at 34-35; see also *State v. Varnell*, 137 Wn.App. 925, 929, 155 P.3d 971 (2007).

Because of the similar rights at stake, the *Cassill-Skilton* court was also persuaded that drug court participants are likewise entitled to a statement of evidence relied upon by the court and the reasons for revoking termination. *Casill-Skilton*, 122 Wn.App. at 656-58 (citing *Marino*, 100 Wn. 2d at 723-24; *Morrissey*, 408 U.S. at 484 (the deprivation of liberty cannot comport with due process unless based on verified facts)). As the *Marino* court noted, the statement of evidence facilitates appellate review and assures that the exercise of discretion involved in probation revocation is based on accurate knowledge. *Marino*, 100 Wn.2d at 723-24.

Thus, a reviewing court should not review the reasonableness of the prosecutor's decision to terminate the offender as in a pretrial diversion agreement, but

instead...review the actively supervised treatment and evaluate the violations leading to the offender's termination. The trial court's function in evaluating a termination decision is similar to evaluating alleged probation violations.

Casill-Skilton, 122 Wn.App. at 657-58. Accordingly, termination of a diversion to drug court violates a defendant's rights to due process, if the termination order was entered without notice of the alleged violation of

the diversion agreement, if the defendant was not given an opportunity for a hearing, or if no findings indicate what evidence the court relied upon in determining whether the agreement was breached. *Cassill-Skilton*, 122 Wn.App. at 653; *Marino*, 100 Wn.2d at 727.

2. The trial court violated Snow's right to due process of law by terminating him from the drug court program.

In order for Snow to be terminated from the drug court program, the court was required to provide him of written notice of the specific claimed violations alleged, conduct an evidentiary hearing, determine whether the State proved the violations, and then enter written findings explaining the reasons for termination from participation in the program. *Cassill-Skilton*, 122 Wn.App. at 653. These requirements were not satisfied in the instant case.

3. The record fails to indicate that Snow was provided with sufficient notice to inform him of the specific drug court obligations he allegedly violated.

For any revocation hearing, due process safeguards at a minimum include: (1) written notice of the claimed violations; and (2) disclosure of the evidence against the accused. *State v. Ziegenfuss*, 118 Wn.App. 110, 114, 74 P.3d 1205 (2003) (citing *In re McNeal*, 99 Wn.App. 617, 628-29, 994 P.2d 890 (2000); *Morrissey*, 408 U.S. at 489). Failure to provide adequate notice, including notice of the hearing and written notice of the

nature of the allegations, requires reversal as a denial of due process.

Cassill-Skilton, 122 Wn.App. at 653.

Here, the court failed to give Snow adequate notice of the specific violations alleged as required in a revocation or termination hearing. *Id.* No evidence in the record indicates that Snow was ever informed of which particular terms of the drug court agreement the State believed he had violated. Instead, the court only gave a historical background of the case, reciting a laundry list of alleged bad conduct during the termination hearing, without any specificity as to what program requirements were violated. Because notice is required for any revocation hearing, the absence of adequate notice of the alleged violations denied Snow his due process right to notice. *Cassill-Skilton*, 122 Wn.App. at 658 (the deferred prosecution statutes RCW 10.05.090 et seq., may guide the court's obligations at a drug court termination hearing).

The trial court did hold a termination hearing. RP 13-42.

However, the record is devoid of any written notice to Snow indicating the specific allegation or allegation(s) to be reviewed at the hearing. Neither does the transcript provide any guidance as to what allegations, or what terms of the drug diversion agreement, the prosecutor was relying on. The court's termination of Snow from the drug court program, without adherence to procedural standards of adequate notice, violated due

process. As such, Snow's convictions should be reversed, and he should be reinstated in the drug court program.

4. Snow's right to confrontation was violated where the only "evidence" of violations were allegations from the treatment provider based on hearsay.

A revocation or termination hearing must be structured to assure that the finding of a violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the defendant's behavior. *Morrissey*, 408 U.S. at 484. Snow contends that at the October 23 termination hearing, his due process rights, including an opportunity to present witnesses and documentary evidence, and to confront and cross-examine adverse witnesses, were violated, and that this was done absent the court specifically finding good cause for not allowing confrontation. *Ziegenfuss*, 118 Wn.App. at 113-14. Hearsay may only be admitted where the State shows both the reliability of the statement and good cause for its admission. The Supreme Court has stated that:

[t]he current test is a balancing one in which the probationer's right to confront and cross-examine witnesses is balanced against any good cause for not allowing confrontation. Good cause has thus far been defined in terms of difficulty and expense of procuring witnesses in combination with "demonstrably reliable" or "clearly reliable" evidence.

State v. Nelson, 103 Wn.2d at 765; see also *State v. Dahl*, 139 Wn.2d at 686-87. Where the State fails to demonstrate that the hearsay is

demonstrably reliable or fails to show any difficulty in procuring live testimony, good cause does not exist to admit hearsay testimony. *Dahl*, 139 Wn.2d at 687.

Federal cases applying the balancing test offer examples of how a court should weigh the competing interests. *United States v. Bell*, 785 F.2d 640, 642 (8th Cir. 1986); *United States v. Martin*, 984 F.2d 308, 310 (9th Cir. 1993). To determine the proper weight to be afforded the right to confrontation, a court should look to the importance of the hearsay evidence to the ultimate revocation decision, the opportunity to refute the evidence, and the consequences of the court's findings. *Martin*, 984 F.2d at 311. *Bell* offers that a "strong showing of good cause" has been made where the government demonstrates an inordinate burden in producing the witnesses and shows the evidence has indicia of reliability. *Bell*, 785 F.2d at 643.

In determining whether the admission of hearsay evidence violates the right to confrontation, the court must weigh the defendant's interest in his constitutionally guaranteed right to confrontation against the State's good cause for denying it. *United States v. Comito*, 177 F.3d 1166, 1170 (9th Cir. 1999). The *Comito* Court ruled that

The weight to be given the right to confrontation in a particular case depends on two primary factors: the importance of the hearsay evidence to the court's ultimate finding and the nature of

the facts to be proven by the hearsay evidence...[t]he more significant particular evidence to a finding, the more important it is that the release be given an opportunity to demonstrate that the proffered evidence does not reflect “verified fact.” So, too, the more subject to question the accuracy and reliability of the proffered evidence, the greater the releasee’s interest in testing it by exercising his right to confrontation.

Comito, 177 F.3d at 1171. In the present case, the trial court based its decision to terminate Snow from the drug court program solely upon allegations by the treatment provider.

This was “plain error,” which is defined as “clear or, equivalently, obvious...under current law.” *United States v. Olano*, 507 U.S. 725, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Accordingly, Snow’s right to confrontation was violated where the only evidence of violations were mere hearsay allegations by the treatment provider.

5. Due process requires a finding of “good cause” be expressed on the record and be based on evidence in the record before denying the right to confrontation.

In this case, Snow’s drug court participation was revoked based on hearsay allegations alone. Assuming for purposes of argument that the hearsay statements offered by the treatment provider were sufficiently reliable, there was no finding of “good cause” by the trial court, nor any effort by the State to establish good cause. Nothing in the record indicates the State even attempted to call live persons as witnesses against Snow. This case demonstrates why the preference for live testimony exists. To

rely on unproven allegations violated Snow's constitutional right to a presumption of innocence. Thus, no *verifiable fact* of wrongdoing was ever presented. The trial court resolved and credited the allegations without hearing from a single live witness. Although the court asked McBride to make recommendations on behalf of NEWTA, McBride's statements to the court regarding the dilute tests, Snow's complaint at Geiger and the officer's response, and Snow's participation in drug court were not made under oath, were not subject to cross-examination, and were in fact hearsay. There was no "good cause" finding by the trial court explaining why live witnesses were not available to testify.

Morrissey requires that a criminal defendant must be afforded his right to confrontation "unless the hearing officer specifically finds good cause." *Morrissey*, 408 U.S. at 489. But here, the trial court also did not make a finding of good cause explaining why live witnesses could not be called as witnesses. Based on hearsay statements and unproven allegations, the trial court found Snow violated his drug court agreement. Although the trial court entered written findings, those findings were based upon hearsay allegations. In addition to the absence of a showing of good cause, the trial court made no finding as to its reasons for permitting the hearsay allegations.

6. Reliability must be determined by an examination of the circumstances surrounding each hearsay statement offered at a termination hearing.

In order to avoid Confrontation Clause problems in a revocation context, a hearsay statement must contain adequate indicia of reliability. *State v. Stevens*, 58 Wn.App. 478, 486, 794 P.2d 38 (1990). Most evidence that falls under a firmly rooted hearsay exception may be admitted because of its presumed trustworthiness. *Id.* at 487. However, where evidence does not fall within a firmly rooted hearsay exception entitled to such presumed trustworthiness, reliability is determined by application of nine nonexclusive guidelines. *State v. Ryan*, 103 Wn.2d 165, 170, 691 P.2d 197 (1984). The *Ryan* factors are: (1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) the timing of the declaration and the relationship between the declarant and the witness; (6) whether the statement contains no expression of past fact; (7) whether cross examination would now show the declarant's lack of knowledge; (8) whether the possibility of the declarant's faulty recollection is remote; and (9) whether the circumstances surrounding the statement are such that there is no reason to suppose the declarant misrepresented defendant's involvement. *Ryan*, 103 Wn.2d at 175-76.

While the foregoing factors are most often employed to determine the reliability offered in the pre-conviction setting, there is no principled reason not to follow the same approach to the reliability determination in a revocation hearing. While he or she is entitled to lesser due process protections, a drug court participant is still entitled to confrontation.

In a pre-conviction setting, the right to confrontation permits hearsay where: (1) the declarant is available for cross-examination or (2) the declarant is unavailable and the statement is reliable. *Ohio v. Roberts*, 448 U.S. 56, 65-66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). In a revocation setting, the right to confrontation permits hearsay where it is reliable and good cause exists to deny live testimony. *Nelson*, 103 Wn.2d at 765. Thus, from one setting to the next, the requirement of reliability remains; all that changes is the threshold which permits the introduction of reliable hearsay. Since the reliability requirement remains the same, no reason exists to change the measure of reliability. Additionally, federal cases have endorsed the use of a *Roberts*-type factor approach to determining reliability in this context. *Bell*, 785 F.2d at 643 n.2; *United States v. Penn*, 721 F.2d 762, 765 (11th Cir. 1983).

Here, the trial court made no finding that the hearsay allegations made by the treatment provider in the order of revocation were demonstrably reliable. The comments that McBride made during the

termination hearing were nothing more than allegations. In *Crawford v. Washington*, 541 U.S.36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court explored the reasons underlying the constitutional guarantee of confrontation, and concluded that reliability of evidence is best determined by following certain procedural rules. *Crawford*, 124 S.Ct. at 1370. Confrontation is not satisfied by subjective or amorphous reliability findings. *Id.* Instead, the constitution “commands” that “reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” *Id.* at 1371. Accordingly, while the *Crawford* case pertained to a different factual circumstance than the present case, it serves as a reminder of the weighty importance of confrontation in protecting an accused’s basic rights during a proceeding that may result in deprivation of liberty. As Justice Scalia noted in his majority opinion,

Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because the defendant is obviously guilty.

Id. Thus, although Snow was not facing a jury, he should have been afforded constitutional protections that serve to meet the same concerns. The constitution does not permit the court to deprive Snow of his ability to contest the allegations by denying him the ability to confront and cross-

examine his accusers. Absent confrontation, Snow had no means by which to challenge the State's allegations.

As set forth above, the State failed to establish either prong necessary for admission of hearsay allegations at the termination hearing, thus depriving Snow of due process. Snow was denied the right to confrontation and was denied the due process of law in his revocation hearing.

7. The State failed to prove the violation by a preponderance of the evidence

The termination entered in Snow's case violated due process because the State failed to prove the violation by a preponderance of the evidence. The State failed to meet its burden of proving any allegations that Snow violated his drug court agreement by a preponderance of the evidence. *Cassill-Skilton*, 122 Wn.App. at 656. In *Cassill-Skilton*, the court found *inter alia* the lack of any statement of evidence relied upon by the trial court required reversal of Cassill-Skilton's convictions:

Here, there is no record to show the basis of termination, any opportunity for a hearing on the alleged violations, nor any findings to show what evidence the court relied on in finding an agreement violation. *Marino* held that, *[W]e emphasize, however, that the trial court needs to clearly state the evidence upon which the court relied. Marino*, 100 Wn.2d at 727, 674 P.2d 171 (emphasis added). *Cassill-Skilton* clearly did not receive due process; the termination decision is reversed and the judgment and sentence vacated in cause number 02-1-01542-7, the drug court charges.

Cassill-Skilton, 122 Wn.App. at 658.

Statements or allegations made in open court are just that, allegations. Here, the State simply failed to meet its burden. The State did not seek to submit any witnesses to testify regarding any alleged violation. There was no evidence submitted whatsoever, including any toxicology reports based on the dilute UAs. Although the dilute UAs were talked about by the parties in the court hearing, the record is devoid of any evidence submitted regarding these dilute UAs. The State failed to enter any evidence whatsoever. The only record the court made for terminating Snow from the drug court program were comments in court, which were simply allegations based on hearsay. As such, Snow's due process rights were violated because the State failed to meet its burden of proving by a preponderance of the evidence that Snow actually committed the said violation.

8. The error was not harmless.

Violations of a defendant's minimal due process right to confrontation are subject to harmless error analysis. *Dahl*, 139 Wn.2d at 688. In *Dahl*, the court noted that 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. *Id.* In *Dahl*, the Supreme Court found that the error was not harmless, since the ruling indicated that the decision to revoke the defendant's SSOSA was based in part on hearsay statements. *Id.* at 689. Accordingly, the Court reversed the trial court and remanded the case. *Id.* at 690.

Here, the error was not harmless. Like *Dahl*, the record in this case indicates that the trial court based its termination order on hearsay statements. Moreover, no testimony from any witness was provided for any possible violation. As stated previously, the court requested that McBride indicate its recommendation as to whether Snow should be terminated, and McBride relayed hearsay statements to the court. McBride was never placed under oath and was not subject to cross-examination. Accordingly, the error was not harmless.

Moreover, due process requires that judges properly articulate the factual basis of their decisions. *Dahl*, 139 Wn.2d at 689; *Nelson*, 103 Wn.2d at 767. Because the drug court termination order in this case was based on hearsay, the due process error in this case was not harmless. *Dahl*, 139 Wn.2d at 689. This court should reverse the trial court's termination order, as Snow was denied due process in the termination of his participation in drug court because there is no record that he had adequate notice of the violation or violations, he was denied an

opportunity to confront witnesses, the trial court failed to show good cause why live witnesses could not testify at the hearing, and because the findings failed to comply with the reasoning in *Marino*. See *Cassill-Skilton*, 122 Wn.App. at 653. Snow asks this court to reverse trial court's order terminating his participation in drug court.

VI. CONCLUSION

Snow respectfully requests that the court find that prejudicial errors were committed below such that his judgment and sentence ought to be reversed and his case remanded for further proceedings. Snow's constitutional right to due process was violated when he was terminated from the drug court program. Snow was not provided sufficient notice of the specific drug court obligations he allegedly violated. The trial terminated Snow from drug court based on hearsay allegations, Snow's right to confrontation was violated, and the State failed to meet its burden of proving the violation by a preponderance of the evidence. These errors were not harmless. As a result, Snow's judgment and sentence should be vacated, and the case remanded back to the trial court for entry back into the drug court program.

RESPECTFULLY SUBMITTED this 24 day of April,

2014.



ELIZABETH HALLS, WSBA #32291
Attorney for Appellant



ANDREA BURKHART, WSBA #38519
Attorney for Appellant

DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Mark Eric Lindsey
Spokane County Prosecutor's Office
1100 W. Mallon Avenue
Spokane, WA 99260

Kevin Bryce Snow, DOC # 849789
Washington State Penitentiary
1313 N. 13th Ave.
Walla Walla, WA 99362

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

Signed this 24th day of April, 2014 in Walla Walla, Washington.


Elizabeth Halls