

FILED

MAY 16, 2014

Court of Appeals
Division III
State of Washington

32144-4-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KEVIN B. SNOW, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
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INDEX

APPELLANT’S ASSIGNMENT OF ERROR.....1

ISSUES PRESENTED.....1

STATEMENT OF THE CASE.....1

ARGUMENT.....2

 A. THE DEFENDANT HAS NOT SHOWN
 THAT THE TRIAL COURT NEEDED TO
 SUPPLY THE DEFENDANT WITH WRITTEN
 NOTICE OF THE VIOLATIONS HE WAS
 CHARGED WITH, NOR DID THE TRIAL
 COURT VIOLATE THE DEFENDANT’S
 RIGHTS BY TERMINATING HIM FROM
 DRUG COURT.....2

 B. THE DEFENDANT CANNOT RAISE
 CONFRONTATION CLAUSE ISSUES
 FOR THE FIRST TIME ON APPEAL4

CONCLUSION.....5

TABLE OF AUTHORITIES

WASHINGTON CASES

STATE V. CASSILL-SKILTON, 122 Wn. App. 652,
94 P.3d 407 (2004)..... 3

STATE V. POWELL, 166 Wn.2d 73,
206 P.3d 321 (2009)..... 6

STATE V. RYAN, 103 Wn.2d 165,
691 P.2d 197 (1984)..... 5

STATE V. SUBLETT, 176 Wn.2d 58,
292 P.3d 715 (2012)..... 5

COURT RULES

RAP 2.5(a) 5

I.

ASSIGNMENT OF ERROR

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

II.

ISSUES

1. Has the defendant shown that he must be given a “written document” outlining the specific drug court provisions he violated?
2. Has the defendant shown that his due process rights were violated by his termination from the drug court program?
3. Did the defendant receive notice both in writing and extensively in the proceedings in two hearings on the issue of his violation of his responsibilities in drug court?
4. Can the defendant raise issues regarding his confrontation rights/hearsay when he failed to object at either hearing?

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

- A. THE DEFENDANT HAS NOT SHOWN THAT THE TRIAL COURT NEEDED TO SUPPLY THE DEFENDANT WITH WRITTEN NOTICE OF THE VIOLATIONS HE WAS CHARGED WITH, NOR DID THE TRIAL COURT VIOLATE THE DEFENDANT'S RIGHTS BY TERMINATING HIM FROM DRUG COURT.

The defendant claims that before a court can conduct a hearing with the goal of terminating a defendant from drug court, the court must provide the defendant with written notice of the alleged violations. The defendant cites to *State v. Cassill-Skilton*, 122 Wn. App. 652, 94 P.3d 407 (2004) as supporting defendant's assertion. This is incorrect. The cited case *does* require that a defendant have notice of the violations, but nowhere in *Cassill-Skilton* does the opinion require a *written* notice of alleged violations.

The defendant's position on this issue fails for at least two reasons. In the first instance, the defendant was brought before the court for a hearing and the allegations were presented. Then the defense asked for a continuance of the October 23, 2013 hearing to a December 11, 2013 date. Therefore, besides being given specific knowledge of what would be deemed a violation of his drug court status and then failing two urinalysis tests, the defendant could not have failed to know what the State would argue. The continuance supplied ample time for the defendant to prepare for a hearing. An examination of the record shows that there

was nearly a complete hearing on October 23, 2013 and a second hearing covering the same material in the December 11, 2013 termination hearing. The defendant had to know the nature of the violations simply from the fact that the violations were discussed in the first hearing and the defendant is the one who created those violations. None of what occurred was a “surprise.”

The original waiver and agreement, signed by the defendant, lists reasons for termination:

1. Failure to attend court hearings or abide by 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
5. Any circumstance necessitating the issuance of a bench warrant.
6. Inability of the defendant/client who regularly participate in treatment, testing and/or review hearings with the Court.

CP 9.

It is plain from the record that neither the defendant, nor his counsel, showed any unfamiliarity with the subject matter of the hearings. There was no objection to the final termination hearing. By electing to proceed through the final revocation hearing, the defendant waived his right to any hypothetical written document, even assuming one was required.

B. THE DEFENDANT CANNOT RAISE CONFRONTATION
CLAUSE ISSUES FOR THE FIRST TIME ON APPEAL.

The defendant claims violations of his right to confrontation. A search of the record turns up no objections from the defense on this issue. Thus, any alleged confrontation issue is waived. *State v. Sublett*, 176 Wn.2d 58, 126, 292 P.3d 715 (2012); RAP 2.5(a).

Additionally, the defendant signed a waiver and agreement upon entering Drug Court wherein the defendant gave up his right to call witnesses and to cross examine State's witnesses. CP 7. The defendant also stipulated to the admissibility, accuracy, and sufficiency of the information set forth in the noted police reports. CP 7.

The defendant makes multiple assertions regarding the "hearsay nature" of statements used by the State by way of confrontation clause issues. The defendant proceeds with an analysis of hearsay statements but never says exactly which statements are problematic. The defendant even goes so far as to invoke the *Ryan* factors from *State v. Ryan*, 103 Wn.2d 165, 170, 691 P.2d 197 (1984). This argument is simply restating issues of confrontation and hearsay. As noted at the outset, the defendant waived his right to raise issues along these lines because he failed to object to the admission of the State's evidence.

The defendant attempts to lay his hearsay/confrontation issue at the feet of the trial court. Brf. of App. 26. The defendant claims that the trial court made

“... no finding that the hearsay allegations made by the treatment provider in the order of revocation were demonstrably reliable.” Brf. of App. 26. This concept is not how the judicial system operates. It is up to the defendant to raise objections to items that the defendant finds to be inadmissible for some reason. By failing to object, the defendant does not give the trial court a chance to correct any perceived errors. The function of the defense counsel is not to be a potted plant. “We adopt a strict approach because trial counsel's failure to object to the error robs the court of the opportunity to correct the error and avoid a retrial.” *State v. Powell*, 166 Wn.2d 73, 82, 206 P.3d 321 (2009).

V.

CONCLUSION

For the reasons stated above, the defendant’s termination from Drug Court should be affirmed.

Dated this 16th day of May, 2014.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,)
)
 Respondent,) NO. 32144-4-III
 v.)
)
KEVIN B. SNOW,)
)
 Appellant,)
)

I certify under penalty of perjury under the laws of the State of Washington, that on May 16, 2014, I e-mailed a copy of the Respondent's Brief in this matter, pursuant to the parties' agreement, to:

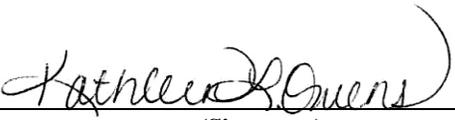
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5/16/2013
(Date)

Spokane, WA
(Place)


(Signature)