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FEBRUARY 24, 2015

Court of Appeals
Division III
State of Washington

NO. 32563-6-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

PERRY ZUVELA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Perry Zuvela appeals from the order issued by the Hon. Judge M. McCarthy of the Yakima County Superior Court revoking his Special Sex Offender Sentencing Alternative (SSOSA) under cause number 08-1-00419-3. CP 77, RP 213. The sentence that followed condemned Mr. Zuvela to serve 120 months in prison. RP 213.

The trial court revoked the SSOSA because Mr. Zuvela ingested a controlled substance in violation of the terms of the suspended sentence. CP 77. This was an abuse of discretion, because the court had categorically refused to even consider anything other course of action. This was also an abuse of discretion because the court's failure not to re-refer Mr. Zuvela for drug treatment he was supposed to have been given – but never received – was manifestly unreasonable.

B. ASSIGNMENTS OF ERROR

1. Appellant assigns error to the trial court's March 7, 2014 decision prejudging any future violation hearing. RP 181.
2. Appellant assigns error to the trial court's refusal to consider Department of Corrections' failure to support Mr. Zuvela's release as a factor mitigating against revocation. RP 198-199.

3. Appellant assigns error to the May 30, 2014 revocation of his Sex Offender Sentencing Alternative (SSOSA) suspended sentence and the imposition of a 120 month standard range sentence. CP 77-87.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

“[I]f you screw up in any regard, okay, regardless of how minor – I’m going to revoke your SSOSA,” is what the trial court said to appellant Perry Zuvela in March of 2014, when releasing him back into the community, with instructions that DOC provide intensive outpatient substance abuse treatment. A trial court abuses its discretion when its ruling is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons,” and when it fails to exercise discretion altogether. Did the trial court abuse its discretion in revoking Mr. Zuvela’s Special Sex Offender Sentencing Alternative (SSOSA) because he admitted ingesting an illegal drug a month after his release, where the DOC failed to place the appellant into a drug treatment program, did not alert the court that the judicial directive to help him went unimplemented, and Mr. Zuvela had nearly five years of sex offender treatment progress behind him?

D. STATEMENT OF THE CASE

In 2008, the State prosecuted Mr. Zuvela for offenses committed against his minor children sometime between 2005 and 2007. CP 8-11. The prosecution and the defense agreed he was statutorily eligible for a SSOSA and jointly advocated for that outcome. RP 24. At the May 13, 2009, sentencing, Hon. Judge R. Reukauf explicitly found that both Mr. Zuvela and the community would benefit from the special sex offender treatment program. CP 26. J. Reukauf granted the SSOSA and suspended execution of the standard range sentence on conditions that Mr. Zuvela be on DOC community custody for life, serve 12 months confinement at the Yakima County Jail, and abide by a host of other terms, including making reasonable progress in sexual deviancy therapy. CP 27-28. Mr. Zuvela started in sex offender treatment with Dr. Mark Cross on May 25, 2009 and kept the same provider until revocation. CP 37, 44-59.

In early 2010, alleging that Mr. Zuvela had committed two misdemeanors, the State moved to revoke the suspended sentence. CP 39-41. Mr. Zuvela agreed there had been two criminal law violations. RP 77. He shoplifted some maple syrup and a pan from a grocery store, and at the time, he had a knife in his pocket. RP 79-80. His defense

counsel let the court know that Mr. Zuvela was otherwise in compliance with the suspended sentence conditions, for example, by abstaining from drugs. RP 83-84. Mr. Zuvela let the court know that the sex offender treatment program had helped him a great deal and that he wanted to stick with it. RP 102-103. The SSOSA was maintained. RP 109.

Three and a half years later, Mr. Zuvela's wife died and he used methamphetamine. CP 65, RP 123. The State again moved to revoke Mr. Zuvela's SSOSA. CP 60-62. The DOC warned Mr. Zuvela that using the controlled substance was a "low level violation," and that all violations after a "5th violation process will be addressed as a high level violation." CP 62. DOC filed a Supplemental Notice of Violation, alleging a total of four days of drug use. CP 64-66. Mr. Zuvela explained he knew he used because "he was still hurting due to his wife's recent death." CP 65, RP 123. With input from the sex offender treatment provider, DOC recommended that Mr. Zuvela be maintained on the SSOSA, but go into inpatient substance abuse treatment with outpatient aftercare to follow. CP 65.

On September 19, 2013, J. Reukauf followed the DOC recommendation and ordered Mr. Zuvela into drug treatment. CP 70.

The court wanted the treatment “to be meaningful.” RP 129. J. Reukauf specifically wanted Mr. Zuvela to go to a residential facility for three to six months, not just one. RP 125. (“I would hate to see him be limited to a 28-day inpatient treatment program.” RP 125.) The judge complained that DOC had not informed the treatment provider about the extent of Mr. Zuvela’s substance abuse history: “I’m struggling with DOC not providing information appropriately. *It’s like we’re setting him up for failure.*” RP 127. (Emphasis added.)

Contrary to what J. Reukauf intended, Mr. Zuvela was given only one month of inpatient treatment at the facility DOC sent him to. RP 135, 147. Follow-up aftercare services were not made immediately available to him either. RP 178. There is no indication in the record that DOC informed J. Reukauf that Mr. Zuvela received less support than what the court wanted.

A few months later, the State again took Mr. Zuvela to court, now alleging as violations a failure to report change of address, two missed sex offender treatment sessions, and failing to maintain law abiding behavior on November 25, 2013. CP 71-73. On March 7, 2014, J. McCarthy heard the State’s motion. RP 141. The supervising CCO confirmed Mr. Zuvela was on the SSOSA for almost five years, and

that between January 2010 and August of 2013 there had been no violations at all. RP 146. While he failed to report a change of address at the end of October of 2013, Mr. Zuvela did not miss any appointments with his CCO and appropriately registered as “homeless” with the sheriff’s office. RP 151. The failure to obey laws violation had to do with traffic offenses, e.g. driving on a suspended license. RP 151-152. Mr. Zuvela was still in sex offender treatment with Dr. Cross, but had fallen behind in his payments. RP 152. He remained willing to work. RP 153.

At the March 7, 2014 revocation hearing, Dr. Cross testified that Mr. Zuvela was “making kind of average progress... generally heading in the right direction, but just taking the time to get there.” RP 168. Dr. Cross said that more treatment would be appropriate. RP 168. He also said that drug abuse was “a cause for concern” and that Mr. Zuvela had missed sessions because of it. RP 169. Dr. Cross said that Mr. Zuvela would remain amenable to sex offender treatment if “able to take control of his drug habit.” RP 165.

Defense counsel pointed out that Mr. Zuvela had been in custody since December of 2013, and that the court, rather than revoke, could order further confinement or a transfer to inpatient treatment. RP

174. Mr. Zuvela explained how after coming out from inpatient treatment in October of 2013, he became homeless and lost all of his life belongings. RP 178. No intensive outpatient treatment had not been set up when this happened. RP 178. He talked about his desire to stay in treatment with Dr. Cross, which he found beneficial, and for additional drug treatment. RP 179-180. DOC confirmed that Mr. Zuvela was not directly placed into an outpatient program following his release from inpatient. RP 147, 149.

J. McCarthy found that Mr. Zuvela violated conditions and said: “I’m going to defer a decision as to how to deal with that violation until essentially two months out.” RP 180. The court added: “*I want Mr. Zuvela to be back out but on intensive outpatient treatment[,] in sex offender treatment, and doing everything and anything that [the CCO] requires of him.*” RP 180. (Emphasis added.) The court insisted that Mr. Zuvela was “not going to get out today, because *there... has to be some plan put in place, particularly in regard to the intensive outpatient treatment.*” RP 180. (Emphasis added.) J. McCarthy decreed: “if you screw up between now and 9th of May... if you screw up in any regard... I’m going to revoke your SSOSA... If you screw up, May 9th

you're going to prison. Okay?" RP 181. The CCO represented that DOC would set up the release plan ordered by the court. RP 181.

Mr. Zuvella was released, but because his medical doctor prescribed him a medication that the drug treatment provider did not want him to be on, he never started outpatient treatment as J. McCarthy ordered. RP 189-191. On his own, Mr. Zuvella stayed drug-free for about a month, but on April 10, 2014, he admitted to his CCO that he used methamphetamine. RP 192.

The State noted another petition to revoke, alleging an ingestion of a controlled substance said to occur on April 7, 2014. CP 74-76. At a May 16, 2014 revocation hearing with J. McCarthy, defense counsel explained that "Mr. Zuvella never got the benefit of being able to get involved in IOP... because he never was allowed to enter the IOP." RP 190. The prosecution acknowledged that "[t]he issue is whether or not there should be any additional opportunity for drug treatment." RP 194. The prosecution further acknowledged "this isn't a situation where the defendant has had contact with minor children." RP 195.

Defense counsel asked that Mr. Zuvella be sent into the treatment program as intended before. RP 190. Mr. Zuvella had a place to live, and a job, available to him if released. RP 196. Defense counsel

emphasized that “the most important part to address here is the fact that he has not received the treatment that we had asked and hoped that he would.” RP 196. Mr. Zuvela admitted he used and asked for the opportunity to participate in drug counseling. RP 198. He pointed out that he was “not giving up” on himself and knew he was “close to finishing [the] SSOSA program.” RP 198.

In response, J. McCarthy referenced the categorical assertion he had made two months earlier: “I admonished him... that further violations or failing – failures to follow the terms of his SSOSA would result in revocation.” RP 189. J. McCarthy revoked the SSOSA, saying to Mr. Zuvela, “unfortunately, you’ve made my decision too easy.” CP 77, RP 199.

E. ARGUMENT

Mr. Zuvela is entitled to reinstatement of his SSOSA.

- a. A trial court has the discretion to maintain a SSOSA even if the offender commits a violation.

The Special Sex Offender Sentencing Alternative statute provides that a sentencing court may suspend the sentence of a first-time sexual offender if the offender has no recent violent offense priors, the crime did not result in substantial bodily harm to the victim, the

offender had an established relationship with, or connection to, the victim, and the standard range of confinement is eleven years or less. RCW 9.94A.670.

A SSOSA disposition is a suspended sentence that may be revoked if there is sufficient proof that the defendant violated a condition of the suspended sentence or has failed to make satisfactory progress in treatment. *State v. McCormick*, 166 Wn.2d 689, 705, 213 P.3d 32 (2009); RCW 9.94A.670(11).¹ During the nearly five year term that Mr. Zuvella was on his SSOSA, it was never alleged against him that he failed to make reasonable progress in sexual deviancy therapy.

However, even when there is a violation, “SSOSA revocation is not the only option available to the sentencing court; instead, confinement under the probation violation statute, RCW 9.94A.634(3)(c), is also an option.” *State v. Partee*, 141 Wn.App. 355, 360, 170 P.3d 60 (2007).² Here, through counsel, Mr. Zuvella asked to trial court to consider an alternative to the revocation, namely, a smooth

¹ RCW 9.94A.670(11) reads as follows: “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. All confinement time served during the period of community custody shall be credited to the offender if the suspended sentence is revoked.”

² RCW 9.94A.634, recodified as RCW 9.94B.040.

transition from custody to intensive outpatient treatment: “What really needs to happen is Mr. Zuvela needs to remain in custody until IOP is ready to begin, whatever the medications are, whatever is going on.” RP 196.

If a SSOSA is revoked, the full original sentence is reinstated. *State v. Dahl*, 139 Wn.2d 678, 683, 990 P.2d 396 (1999). In Mr. Zuvela’s case, revocation resulted in him being ordered to serve the original term of ten years in prison. RP 213.

- b. The trial court abused its discretion because it failed to exercise it.

A trial court decision to revoke a SSOSA suspended sentence is reviewed for an abuse of discretion. *State v. Miller*, 159 Wn.App. 911, 917-18, 247 P.3d 457 (2011), citing *Partee*, 141 Wn.App. at 361. A trial court abuses its discretion if its decision 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 trial court only exercises its discretion when it engages in actual reflection or deliberation, and the failure to exercise discretion is in itself an abuse of it. In the context of an appeal from the denial of a

request for an exceptional sentence down, review may be had “where the court has refused to exercise discretion at all.” *State v. Garcia-Martinez*, 88 Wn.App. 322, 330, 944 P.2d 1104 (1997) (“A court refuses to exercise its discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstances.”) Our Supreme Court reached the same conclusion in an appeal from a denial of a request for a Drug Offender Sentencing Alternative. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). “Where a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider the sentence, or the refusal to consider it for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal.” *Id.*

Here, the trial judge told Mr. Zuvela on March 7, 2014, “if you screw up, May 9th you’re going to prison.” RP181. Even if this was a well-intentioned attempt at scaring Mr. Zuvela into compliance, it represented an impermissible categorical prejudging of any future violation hearing. As things turned out, Mr. Zuvela did “screw up,” but he also had an explanation which should have been considered. Mr. Zuvela’s lawyer accurately noted that the clash between Mr. Zuvela’s prescription medication and the treatment program was “a perfect

storm.” RP 196. Defense counsel tried to point out the fact that this was a third systemic failure to afford Mr. Zuvella appropriate drug treatment: “[he] is just having a hard time getting through this unless we give him the necessary treatment.” RP 196. J. Reukauf’s prophecy – “It’s like we’re setting him up for failure” – came true. RP 127.

Unfortunately, the trial court had already verbalized a rigid promise, to revoke no matter what. RP 181. It is understandable that J. McCarthy would have felt obligated to follow-through on what he had said, but this approach was a categorical refusal to even consider any alternative, and thus an abuse of discretion. *See supra, State v. Grayson; State v. Garcia-Martinez. See also State v. Pettitt*, 93 Wn.2d 288, 296, 609 P.2d 1364 (1980) (Prosecutor who “could imagine no situation” to warrant a departure from an automatic means of making habitual criminal charging decisions held to be impermissibly using a “fixed formula” which “constitutes an abuse of discretionary power.”)

- c. The trial court’s decision to revoke Mr. Zuvella’s SSOSA was manifestly unreasonable.

Mr. Zuvella was not engaging in violations that involved any potential victim. He was not engaging in a violation that was sexual in

nature. The revocation – which came five years into his sex offender treatment participation – was not well-taken.

In contrast, *State v. Miller*, 159 Wn.App. 911, 917-18, 247 P.3d 457 (2011) serves as an example of an appropriate decision to revoke a SSOSA, rather than impose sanctions. In *Miller*, “the trial court revoked Miller's suspended sentence because it found several compelling reasons to revoke the SSOSA rather than impose sanctions.” 159 Wn.App. at 919. *Miller*'s violations involved a “very vulnerable minor child who was of an age similar to that of the child against whom he had previously offended.” *Id.* *Miller* was alone with the child, had failed to completely disclose his offense behavior, and then “engaged in a series of deceptive acts in order to prevent his CCO or the trial court from discovering his extremely concerning behavior.” *Id.* at 919-20. On those facts, “the trial court did not abuse its discretion by revoking Miller's SSOSA.” *Id.* at 923.

While our Supreme Court held in *State v. McCormick*, 166 Wn. 2d 689, 692-93, 213 P.3d 32 (2009) that due process does not require the State to prove a willful violation of condition of suspended sentence in order to justify a SSOSA revocation, the *McCormick* court “based this conclusion on the fact that the violation [in question] was a ‘threat

to the safety or welfare of society.” *State v. Miller*, 180 Wn. App. 413, 325 P.3d 230 *review denied*, 336 P.3d 1165 (2014). Indeed, the revocation in *McCormick* – deemed to have been an appropriate exercise of judicial discretion on appeal – came after that defendant’s fourth consecutive violation of a condition designed to keep him away from contacting minors. *McCormick*, at 706.

The public safety concerns in Mr. Zuvela’s case are simply incomparable, which is why the revocation was manifestly unreasonable. To the extent any concerns were present, they should have been managed with a referral to substance abuse treatment, not throwing away the proverbial key.

The Washington State Institute for Public Policy (WSIPP) has studied SSOSA participants and found that nearly 85% of SSOSA revocations occur within three years of sentencing. ROBERT BARNOSKI, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, SPECIAL SEX OFFENDER SENTENCING ALTERNATIVE REVOCATIONS (2006), http://www.wsipp.wa.gov/ReportFile/929/Wsipp_Special-Sex-Offender-Sentencing-Alternative-Revocations_SSOSA-Revocations.pdf. WSIPP researchers also observed recidivism of

SSOSA participants and noted the five-year felony sex recidivism rate for SSOSA offenders revoked were just 3.8% and fell down to a 1.3% figure for those not revoked. *Id.* ex. 3.

In other words, those who are not cut out for the program surface early. By “making it” on his SSOSA for as long as he did, by taking advantage of therapy with Dr. Cross, and by not engaging in any sex-crime related behavior, Mr. Zuvella demonstrated that he presented a marginally low risk of re-offense.³ The trial court was wrong to revoke the SSOSA.

F. CONCLUSION

For the reasons stated above, Mr. Zuvella respectfully asks this Court to reverse and reinstate his SSOSA, or grant any other relief it deems appropriate.

DATED this 24th day of February 2015

Respectfully submitted,



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³ Lifetime DOC supervision applies to his case. RP 170.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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v.)	NO. 32563-6-III
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PERRY ZUVELA,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24TH DAY OF FEBRUARY, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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