

No. 34704-4-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER NOVIKOFF,

Appellant.

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

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR AND ISSUES 1

B. STATEMENT OF THE CASE..... 1

C. ARGUMENT 6

 1. The trial court erred in concluding that revocation was the only available sanction for a single violation following three years of successful treatment, because the statutes at issue permit jail terms as sanctions 6

 a. *Miller* is inapposite. 7

 b. *Partee* and *Badger* control. 9

 c. The remedy is remand to the sentencing court to exercise its discretion to consider a lesser sanction. 12

 2. The trial court erred in concluding that Mr. Novikoff failed to make “satisfactory progress” in treatment, where he was an “above average” participant for over three years and simply had a setback with a single violation of a nonsexual nature 16

D. CONCLUSION..... 18

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Conover, 183 Wn.2d 706, 355 P.3d 1093 (2015) 16

State v. McCormick, 166 Wn.2d 689, 213 P.3d 32 (2009) 13, 14

Washington Court of Appeals Decisions

Clark v. City of Kent, 136 Wn. App. 668, 150 P.3d 161 (2007)..... 17

State v. Badger, 64 Wn. App. 904, 827 P.2d 318 (1992) 9, 10, 11, 12

State v. Miller, 180 Wn. App. 413, 325 P.3d 230 (2014) 7, 16

State v. Partee, 141 Wn. App. 355, 170 P.3d 60 (2007)..... passim

State v. Ramirez, 140 Wn. App. 278, 165 P.3d 61 (2007)..... 14

United States Supreme Court Decisions

Bearden v. Georgia, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983)
..... 7

Statutes

RCW 9.94A.670..... 2

RCW 9.94B.040..... 10, 11, 12

A. ASSIGNMENTS OF ERROR AND ISSUES

1. The trial court erred in concluding that revocation of probation was the only available sanction for a single violation, following three and a half years of successful treatment, where the statutes at issue permit jail terms of up to 60 days as sanctions.

2. The trial court erred in concluding that Mr. Novikoff had not made satisfactory progress in treatment, where he was an “above average” participant for over three years, never engaged in any sexual misconduct or had any contact with minors, and simply had a setback for 3-4 months during which he used marijuana to alleviate the pain of a serious back injury.

B. STATEMENT OF THE CASE

When Christopher Novikoff was a child, he was a victim of repeated sexual abuse at the hands of his uncle. RP 64, 71. Notwithstanding the trauma, he grew up to become a gainfully employed adult who successfully raised two sons. RP 71.

Unfortunately, he eventually repeated the acts perpetrated upon him by sexually offending against his grandchildren. The State charged him with three counts of first-degree child molestation. CP 1-2. He immediately pleaded guilty, stating, “I do not wish to bring any more difficulty to the children.” RP 10.

At sentencing, the jail pastor testified that Mr. Novikoff displayed genuine remorse, and a sex offender treatment provider reported that Mr. Novikoff had a low risk to reoffend and was a good candidate for a Special Sex Offender Sentencing Alternative (SSOSA). RP 67, 73; *see* RCW 9.94A.670. The court imposed a SSOSA. It sentenced Mr. Novikoff to 130 months to life in prison, imposed one year in jail, and suspended the remainder of the sentence. The court ordered five years of sex offender treatment and imposed numerous conditions of community custody. RP 73-90; CP 29-41.

After serving his jail term, Mr. Novikoff began treatment. He worked hard and performed well in treatment for years. RP 167; Supp. CP ____ (Sub no. 41.1); Supp. CP ____ (Sub no. 44.1); Supp. CP ____ (sub no. 70) at 3 (court finds Mr. Novikoff’s quarterly treatment reviews “were all positive”). Indeed, in most of the quarterly reports, the treatment providers described Mr. Novikoff’s participation as “above average.” Supp. CP ____ (Sub no. 44.1).

The court praised Mr. Novikoff’s progress at review hearings. RP 99, 103. In March of 2015, the court told Mr. Novikoff, “you’re ahead of schedule. You’re doing well.” RP 103. Mr. Novikoff graduated from group sessions and progressed to individual sessions just once per month. CP 70; RP 160-61.

In the spring of 2016, Mr. Novikoff severely injured his back, resulting in considerable pain. Supp. CP ____ (sub no. 70) at 3. He eventually had to close his construction business because of the injury. *Id.* His doctor prescribed hydrocodone, and Mr. Novikoff used it but did not like the side effects. RP 185.

Mr. Novikoff asked his treatment provider and community corrections officer (CCO) if he could use marijuana to alleviate the pain. Supp. CP ____ (sub no. 70) at 4; RP 133-34. At first the CCO said he did not have a problem with it, but after consulting with the treatment provider, they conditioned their approval on receipt of documentation confirming that a doctor would monitor Mr. Novikoff's marijuana use. RP 124-25, 150, 163; Supp. CP ____ (sub no. 70) at 4.

According to Mr. Novikoff, he immediately requested the necessary document from the VA hospital, but they are "glacial" in responding to such requests. RP 183; *see also* RP 172 (treatment provider similarly testifies that when she left a message with the VA requesting a return call, they never called her back). Mr. Novikoff continued to use marijuana for his pain while he waited for the promised documents. Supp. CP ____ (sub no. 70) at 4. The CCO and treatment provider were not pleased that Mr. Novikoff continued to use marijuana before receiving the

documents from the VA, and they felt he was not forthcoming when discussing the issue. Supp. CP ____ (sub no. 70) at 4-5.

On August 7, 2016, the treatment provider terminated Mr. Novikoff's treatment based on the above concerns. CP 71. She stated, "While at this time, I am not aware of Mr. Novikoff being unsupervised around minor females, I am concerned with his decision making abilities and actions." CP 71.

That same day or the next day, Mr. Novikoff finally received the required medical documentation and gave it to the CCO and treatment provider. CP 68. The CCO nevertheless filed a "Notice of Violation" on August 8, 2016. CP 64. The alleged violation was "failing to successfully complete sexual deviancy treatment as ordered, by being unsuccessfully terminated on or about 8/7/16." CP 64. This was the first and only violation that had ever been alleged against Mr. Novikoff during the three and a half years he was on community custody and participating in treatment. CP 68; RP 150.

The treatment provider told the CCO that she "would be willing to continue working with Mr. Novikoff." CP 69. She suspended him from treatment because she "hopes he gets the message that this is serious." CP 69.

Notwithstanding the treatment provider's statements indicating that her actions were intended to serve as a wake-up call, and notwithstanding the fact that the alleged violation was the first in over three years of treatment and community custody, the State moved to revoke the SSOSA. CP 64.

Mr. Novikoff objected to revocation. He emphasized that he was diligent with his treatment program for years, and that his alleged violation did not involve contact with minor children or possession of pornography or other sexual misconduct. RP 212. He pointed out that in most cases defendants are sentenced to jail terms for initial violations, and that the statutes permit this lesser sanction. RP 212; CP 72-76.

The State, on the other hand, claimed that revocation was the only available sanction. RP 145. The court agreed with the State. RP 219-22.

The court acknowledged Mr. Novikoff's progress, stating:

I want to first talk about what you have accomplished here. And it's considerable. There have been no violations for [a] three or four-year period. And you have – another way that Mr. Morgan brought out, you remained a low risk for basically four years. And you passed all the polygraphs, which to me is very telling.

RP 219. The court noted, "You did graduate from group, and then you were in one-on-one setting with Ms. Peterson." RP 220. The judge was sympathetic about Mr. Novikoff's back pain, but said "the crux of the

matter” was that he had been terminated from treatment. RP 220. The court stated that even though the treatment provider had reluctantly agreed to continue treating Mr. Novikoff, the only available sanction was to revoke the SSOSA. RP 222. The court “grudgingly” ordered revocation. RP 222; CP 77; Supp. CP ____ (sub no. 70).

Mr. Novikoff appeals. CP 78.

C. ARGUMENT

1. The trial court erred in concluding that revocation was the only available sanction for a single violation following three years of successful treatment, because the statutes at issue permit jail terms as sanctions.

In the trial court, Mr. Novikoff argued that SSOSA revocation was inappropriate for this first and only violation in over three years of treatment and community custody. He asked the court to impose a jail term and order his return to treatment. RP 212-16; CP 72-76. The State argued that revocation of the SSOSA was the only available sanction, and the trial court accepted the State’s argument. RP 145, 219-22. This ruling was error, and this Court should reverse. The issue is a question of law this Court reviews de novo. *State v. Partee*, 141 Wn. App. 355, 362, 170 P.3d 60 (2007) (“Whether a trial court has discretion to impose probation sanctions in lieu of revoking a SSOSA is a question of law, which we review de novo.”).

a. Miller is inapposite.

The court concluded that revocation was the only available sanction under *State v. Miller*, 180 Wn. App. 413, 325 P.3d 230 (2014). RP 218-22. This conclusion is incorrect, because *Miller* is not on point.

In *Miller*, the defendant never even started sex offender treatment after serving his jail term. *Id.* at 415. He did not have the funds to pay for treatment, and there is no provision for public funding of sex offender therapy. The State moved to revoke the SSOSA, but the court granted the defendant an extension of time to obtain funding and start treatment. *Id.* at 415-16. When the defendant still was not able to comply, the State renewed its petition for revocation. *Id.* at 416. The court found that the defendant was not currently in treatment and would not be able to obtain the resources to start treatment within a reasonable time. It therefore revoked the SSOSA. *Id.*

The defendant's primary argument on appeal was that the revocation violated the Fourteenth Amendment because it was essentially a punishment for poverty. *Miller*, 180 Wn. App. at 416-24; see *Bearden v. Georgia*, 461 U.S. 660, 662, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983). This Court rejected that argument on the grounds that "[t]he trial court properly considered whether there were alternative forms of punishment other than incarceration." *Id.* at 424.

Thus, *Miller* does not stand for the proposition that the only available sanction for the type of violation at issue here is revocation of the SSOSA. The case is inapposite because it addressed the equal protection and due process arguments of a homeless defendant who never started treatment.

But to the extent *Miller* is relevant, it supports Mr. Novikoff's position, not the State's. In *Miller* this Court affirmed the trial court only *because* the trial court had considered alternatives to revocation. *See id.* at 424. Thus, the trial court in Mr. Novikoff's case erred in reading *Miller* as foreclosing lesser sanctions.

The trial court stated:

And that case [*Miller*], when I read it carefully, instructed the court, trial court, to see if there's any alternative forms of punishment available. And that would be, as [Mr. Novikoff's attorney] has pointed out, perhaps, say, 60 days for a violation would be one option there. Another one, though, would be, **another way to read that would be that if treatment is not available then that's not an alternative available to the court, and if it's not then again the – the position would be revocation and prison.**

RP 219 (emphasis added). The Court concluded:

And the final analysis is that I'm going to revoke your – your 130 months. And I – **I do that grudgingly, but I think under *State v. Miller* that is what I have available to me here.**

RP 222 (emphasis added).

In other words, the trial court rejected Mr. Novikoff's argument that the court was authorized to order a jail term followed by return to treatment, and instead read *Miller* to require revocation when the violation is being expelled from treatment. RP 219-22. This was error. As explained below, this Court has repeatedly held that lesser sanctions are available for SSOSA violations.

b. *Partee* and *Badger* control.

This Court held that sanctions short of revocation are available for SSOSA violations in *Partee*, 141 Wn. App. at 357 and *State v. Badger*, 64 Wn. App. 904, 909-10, 827 P.2d 318 (1992). In *Badger*, the trial court imposed a SSOSA after the defendant was convicted of first-degree child molestation. 64 Wn. App. at 906. The State alleged the defendant committed numerous violations shortly after his release from jail, including contacting minor children and failing to enter sex offender treatment. *Id.* The trial court found by a preponderance of the evidence that the defendant had committed these violations, and revoked the suspended sentence. *Id.* at 907.

On appeal, *Badger* raised multiple issues, most of which this Court rejected. But this Court agreed with the defendant regarding one issue: the trial court had "expressed doubt" about whether it had the option to impose a jail sentence of up to 60 days in lieu of revoking the SSOSA. *Id.*

at 910. This Court held that the applicable statutes afforded this option, and remanded to the trial court to exercise its discretion to consider a sanction short of revocation. *Badger*, 64 Wn. App. at 910.¹

Division Two agreed in *Partee*, 141 Wn. App. at 360. There, the defendant was convicted of second-degree rape of a child and second-degree child molestation, and received a SSOSA. *Id.* at 358. About a year after beginning treatment, the defendant violated his conditions by failing to attend treatment sessions. *Id.* The trial court noted the violation but did not impose sanctions. *Id.*

The defendant later committed numerous violations, including having unapproved contact with minors at least eight times, and failing a polygraph examination. *Partee*, 141 Wn. App. at 358. His treatment provider terminated him from treatment and recommended revoking the SSOSA because the defendant was not amenable to treatment and was a danger to the community. *Id.* at 358-59. Another treatment provider also testified that he would not treat the defendant, but instead of recommending revocation suggested “a substantial period of confinement”

¹ The applicable statutes at the time were RCW 9.94A.200 and RCW 9.94A.120(7). These statutes have since been recodified at RCW 9.94B.040 and RCW 9.94A.505(vii), respectively. RCW 9.94B.040 states, in relevant part: “If an offender violates any condition or requirement of a sentence, the court may ... order the offender to be confined for a period not to exceed sixty days for each violation”

followed by return to treatment. *Id.* at 359. The provider thought a term of confinement “would provide a shock experience that might make Partee amenable to treatment.” *Id.* Consistent with this testimony, the defendant requested a sanction of consecutive jail terms followed by return to treatment. *Id.*

The sentencing court found that Partee had been terminated from sex offender treatment for unsatisfactory progress and had violated the terms of his suspended sentence. *Id.* The court concluded it lacked the authority to impose consecutive terms of confinement, and therefore revoked the SSOSA. *Id.* at 359-60.

Division Two reversed. It agreed with this Court that when a person violates the conditions of a SSOSA – including by being terminated from treatment – revocation is not the only available sanction. *Partee*, 141 Wn. App. at 360, 362-63 (citing *Badger*, 64 Wn. App. at 910). Instead, under the statute, a trial court may impose up to 60 days in jail per violation as a sanction instead of revoking the SSOSA. *Partee*, 141 Wn. App. at 362-63. The Court remanded to the sentencing court to exercise its discretion to consider this option. *Id.* at 363.²

² At the time of *Partee*, the relevant statute was RCW 9.94A.634. Again, that statute (which was 9.94A.200 at the time of *Badger*) is now codified at RCW 9.94B.040.

Here, as in *Badger*, the trial court “expressed doubt” about whether it had the discretion to impose a jail sentence of up to 60 days in lieu of revoking the SSOSA. *Badger*, 64 Wn. App. at 910; *see* RP 219-22. Here, as in *Partee*, the defendant was terminated from treatment, but this termination does not foreclose sanctions short of revocation. *Partee*, 141 Wn. App. at 358-59. Indeed, both in *Partee* and in this case, treatment providers indicated that a stint in custody would serve as a wake-up call for the defendant to recommit himself to therapy. *Partee*, 141 Wn. App. at 359 (incarceration “would provide a shock experience that might make Partee amenable to treatment”); CP 69 (Mr. Novikoff’s treatment provider tells CCO she “would be willing to continue working with Mr. Novikoff. She hopes he gets the message that this is serious.”). The trial court erred in concluding it lacked the authority to impose sanctions short of revocation. *Partee*, 41 Wn. App. at 360; *Badger*, 64 Wn. App. at 910.

- c. The remedy is remand to the sentencing court to exercise its discretion to consider a lesser sanction.

Where, as here, the sentencing court expresses doubt about its ability to impose a sanction short of revocation, the remedy is reversal and remand to the trial court to consider alternative sanctions under RCW 9.94B.040. *Partee*, 141 Wn. App. at 363; *Badger*, 64 Wn. App. at 910 (“we remand to permit the court to exercise its discretion in deciding

whether to continue with the original sentence or to impose the 60-day sanction for violation of the sentencing conditions, with credit for time served.”).

A lesser sanction is appropriate here, and the trial court appeared to agree. RP 219-22 (court finds Mr. Novikoff committed the alleged violation but praises his “considerable” progress and states it only “grudgingly” revokes the SSOSA). Mr. Novikoff worked hard and performed well for three and a half years in treatment and on community custody. Supp. CP ____ (sub no. 70) at 3. He was consistently rated an “above average” patient with a low risk to reoffend. Supp. CP ____ (Sub no. 44.1); RP 132, 178, 219. Although the treatment program is rigorous and the community custody conditions onerous, Mr. Novikoff had no violations until the violation at issue here. RP 150; CP 68. And while any violation must be taken seriously, the violation here was not a major infraction; there was no contact with minor children, no possession of pornography, and no sexual misconduct of any kind. Supp. CP ____ (Sub no. 70).

As Mr. Novikoff pointed out in the trial court, sanctions short of revocation are generally imposed for first violations – even where the violations are numerous and/or serious. CP 72-76. *See, e.g., State v. McCormick*, 166 Wn.2d 689, 213 P.3d 32 (2009); *State v. Ramirez*, 140

Wn. App. 278, 165 P.3d 61 (2007). In *McCormick*, the defendant completed two or three years of treatment, and the court deemed the treatment requirement satisfied. 166 Wn.2d at 693. But the defendant then violated the terms of his probation by having contact with minor children. *Id.* Instead of revoking probation, the court sanctioned the defendant to reenroll in treatment. *Id.* The defendant again violated his sentence by frequenting areas where children congregate on three separate occasions. *Id.* Again, the trial court did not revoke the SSOSA but instead sanctioned the defendant to 120 days in jail followed by more sexual deviancy treatment. *Id.*

Finally, when McCormick again violated his conditions by frequenting areas where minors congregate, his therapist terminated treatment and the State moved to revoke the SSOSA. *McCormick*, 166 Wn.2d at 693-94. The trial court found the defendant committed the violations, and noted, “this isn’t the first time Mr. McCormick has been here for similar violations.” *Id.* at 696. Because repeated warnings and lesser sanctions had been ineffective, the court revoked the SSOSA. *Id.*

Similarly, in *Ramirez*, the trial court gave the defendant chances to improve by imposing lesser sanctions for initial violations before imposing the extreme sanction of revocation for subsequent misconduct. *Ramirez*, 140 Wn. App. at 285. A couple of years into his SSOSA, the

defendant committed multiple violations, including failing to attend scheduled treatment group sessions and using controlled substances. *Id.* at 283. The court did not revoke the SSOSA, instead punishing the defendant with 120 days in jail. *Id.* But the defendant did not learn his lesson and immediately violated the terms of his sentence again following his release. *Id.* at 283-85. This time, the court revoked the SSOSA. *Id.* at 285.

Like the defendants in *McCormick* and *Ramirez*, Mr. Novikoff should be given a sanction short of revocation for his first violation. This is especially so where Mr. Novikoff successfully participated in treatment and complied with his community custody conditions for three and a half years before committing any violations, and where his lone violation was not sexual in nature. The treatment provider stated that she would be willing to work with him again if he complied with her conditions, and Mr. Novikoff testified that he would comply if given the opportunity to return to treatment. CP 69; RP 175-78, 200-201; *see also* RP 135 (CCO says he would be willing to continue supervising Mr. Novikoff).

Accordingly, an appropriate sentence for this violation would be 60 days in jail (with credit for time served) followed by reenrollment in treatment and compliance with the treatment provider's conditions. Mr.

Novikoff asks this Court to remand to the sentencing court so that it may exercise its discretion to consider this sanction in lieu of revocation.

2. The trial court erred in concluding that Mr. Novikoff failed to make “satisfactory progress” in treatment, where he was an “above average” participant for over three years and simply had a setback with a single violation of a nonsexual nature.

The trial court also erred in concluding that Mr. Novikoff failed to make satisfactory progress in treatment. Supp. CP ____ (Sub no. 70) at 6. This constitutes an independent basis for reversal and remand for a new hearing.

The trial court properly characterized this determination as a conclusion of law. Supp. CP ____ (Sub no. 70) at 6. Whether a person’s performance is “satisfactory” is generally a matter of judgment, not of fact. Furthermore, the meaning of the phrase “satisfactory progress” is an issue of statutory construction, which is a question of law. Thus, the trial court’s conclusion that Mr. Novikoff did not make “satisfactory progress” is an issue of law this Court reviews de novo. *See State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015) (issues of statutory construction are reviewed de novo).³

³ If this Court disagrees and believes it is a finding of fact, the Court would review the finding for substantial evidence. *Miller*, 180 Wn.2d at 425. Substantial evidence is “evidence sufficient to persuade a fair-minded, rational person of the truth of the declared premise.” *Id.*

The trial court based its conclusion on Mr. Novikoff's performance between May and August of 2016, when he overruled marijuana, failed to comply with the directive to wait for the medical documentation, and was not completely open in his communication with his CCO, therapist, and chaperone. Supp. CP ____ (Sub no. 70) at 6. But this four-month setback cannot be viewed in isolation. A common-sense reading of the phrase "satisfactory progress" means measurable improvement relative to the *start* of treatment, not relative to an arbitrary point in the process. *See Clark v. City of Kent*, 136 Wn. App. 668, 672, 150 P.3d 161 (2007) (courts use common sense when interpreting statutes).

Mr. Novikoff made significant progress over three and a half years of treatment, earning positive quarterly reports from his treatment provider and praise from the court at review hearings. *See* Supp. CP ____ (Sub no. 41.1); Supp. CP ____ (Sub no. 44.1); Supp. CP ____ (sub no. 70) at 3; RP 99, 103, 167. Mr. Novikoff graduated from group therapy and passed all of his polygraph tests. RP 219-20. He committed no violations for three and a half years and was consistently evaluated as a low risk to reoffend. RP 219. He did such a good job that in 2015 the court told Mr. Novikoff, "You're ahead of schedule. You're doing well." RP 103. In other words, he was on target to complete his treatment early in 2015, and then suffered a setback in 2016. But overall, he made "considerable" progress. RP 219.

Progress is not linear, and setbacks are part of any endeavor. If a person is making progress *on the whole*, this should constitute “satisfactory progress” within the meaning of the statute. Accordingly, this Court should hold the trial court erred in concluding Mr. Novikoff failed to make satisfactory progress.

D. CONCLUSION

Because the sentencing court expressed doubt about the availability of sanctions other than revocation, Mr. Novikoff asks this Court to remand to the sentencing court to exercise its discretion to consider lesser sanctions. This Court should also hold the trial court erred in concluding that Mr. Novikoff failed to make satisfactory progress in treatment. That conclusion should be stricken on remand.

DATED this 15th day of May, 2017.

Respectfully submitted,

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CHRISTOPHER NOVIKOFF,)	
)	
Appellant.)	

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