

NO. 34704-4-III
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
RESPONDENT,
V.
CHRISTOPHER L. NOVIKOFF
APPELLANT.

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. Appellant claims that the trial court erroneously failed to consider lesser available sanctions.
2. Appellant claims that the trial court's finding that Defendant failed to make satisfactory progress in treatment was in error.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court properly considered lesser alternatives to total SSOSA revocation.
 2. The trial court's determination that the Defendant had not made satisfactory progress in treatment was not an abuse of discretion where Defendant was terminated from treatment and where Defendant continued to use drugs even though drugs were an identified risk factor to reoffend, ignored his support system, and failed to recognize necessary steps to limit risk to the community.
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III. STATEMENT OF THE CASE

Between the years of 2009 and 2011, Defendant Christopher Novikoff molested his then-wife's two granddaughters and one grandson, who were all between the ages of 4 and 11 at the time of the molestation. RP 11-12; 15-16; 46; CP 120-127. During this time, Defendant and his wife, the children's maternal grandmother, assisted in caring for the children, who were particularly vulnerable after having been removed from their parents' custody during dependency proceedings due to physical abuse from their mother. RP 39. Defendant told the victims that if they disclosed the sexual abuse [from him], they would be taken away, separated, and put in foster homes. RP 47.

On December 23, 2011, Defendant pled guilty as charged to the above offenses: three counts of Child Molestation in the First Degree, Domestic Violence. RP 4; 9-16. The Defendant asked the Court to impose a Special Sex Offender Alternative Sentence ["SSOSA"], while the State objected to a SSOSA and requested that Defendant be sentenced to the maximum sentence of 130 months in the State Penitentiary. RP 4-5; 40-41; 59-62. At the sentencing hearing, held on February 10, 2012, the Court considered the pre-sentence investigation report ["PSI"] prepared by Department of

Corrections [“DOC”] Officer Travis Hurst and a SSOSA evaluation report prepared by Dr. Paul Wert, as well as argument from Counsel for the State and Defense and statements from the three minor victims, their father, their maternal and paternal grandmothers, and Defendant’s pastor. RP 33-36; 39-40; 46-58.

Dr. Wert identified certain risk factors, namely “a substantial history of drug and alcohol abuse,” “having deviant sexual attraction,” and “a diagnosis of Personality Disorder.” CP 85-94. Nevertheless, Dr. Wert concluded that Defendant would appear to be amenable to community-based treatment. *Id.* Dr. Wert specifically identified treatment objectives, including learning self-regulation and management, and identification of his offense cycle. *Id.* CCO Hurst, on the other hand, did not support the SSOSA, based in part on Defendant’s use of drugs (in particular, marijuana), his spiraling out of control, and his continued disregard for the law regarding illegal drug use and alcohol-related offenses. CP 95-110.

At sentencing, the Court heard testimony that the minor victims were confused, angry, sad, embarrassed, could not concentrate at school, suffered from bad dreams, had trouble sleeping due to the abuse, and feared that Defendant had also abused their minor cousins. RP 48; 55-56. The Court also heard that

the children's paternal grandmother feared Defendant would offend again. RP 50.

In response, Defense counsel argued that Defendant's acts were "non-violent", that he had accepted responsibility, and that he was "treatable", even though Defendant had not submitted to a polygraph as part of Dr. Wert's evaluation. RP 43; 57-59. During Defendant's brief allocution, he blamed his bad decisions on "sociological and psychological influences" and stated that his only goal was to make amends and "move on". RP 68-69.

The Honorable Allen Nielson, speaking for the Court, found that the Defendant's remorse, his taking responsibility, and his prior victimization were mitigating factors. RP 70-71. The Court found that the fact that the Defendant knew that the victims had already been abused and were particularly vulnerable, the duration of the abuse, and the children's loss of innocence were aggravating factors. RP 72-73. The Court weighed Dr. Wert's assessment that Defendant was a "low risk" to reoffend against DOC Officer Hurst's assessment that Defendant failed to grasp the amount of damage he had caused his grandchildren by victimizing them, as well as his concern over the lack of a polygraph examination. RP 73-74. Officer Hurst also noted that Defendant had a lengthy history of drug (including marijuana)

and alcohol abuse, the use of which coincided with criminal activity. CP 95-110. Of great concern to Officer Hurst was the fact that Defendant had reported having sexual thoughts about children as far back as 1998, and that Defendant had not submitted to a polygraph test, leading to concerns that there were more undisclosed victims. Id. Officer Hurst recommended confinement within the standard range. Id.

The Court ultimately granted the SSOSA “with some hesitance”, but noted that part of his decision was based on the fact that “this is not just dumping [Defendant] out into the street, but that he is in a position to follow through on the treatment program that will be put together here.” RP 74-75, emphasis added. The Court ordered Defendant to undergo and successfully complete 60 months of outpatient sex offender treatment with Edward J. Averitt, MS. CP 32. The Court also incorporated Appendix H, which contains DOC’s Conditions of Community Custody, into the Judgment and Sentence. RP 77, CP 39-41. These conditions also required that Defendant “fully comply” with all recommendations of Sex Offender Treatment. CP 40. Prior to engaging in treatment, Defendant was required to serve 12 months in prison. RP 74.

Defendant had review hearings in August of 2013, March of

2015, September of 2015, and March of 2016. RP 91; 97; 100; 104; 107. At the March 2015 hearing, it was noted that Defendant had switched sex offender treatment providers from Edward Averitt, who had retired, to Terry Peterson. RP 102. No compliance issues were noted at these review hearings. RP 91; 97; 100; 104; 107.

However, on August 18, 2016, the State moved to revoke Defendant's SSOSA based on a Notice of Violation received from DOC alleging that Defendant had failed to complete sexual deviancy treatment successfully as ordered by being terminated on August 7, 2016. CP 64-71. Terry Peterson, Defendant's sex offender treatment provider, detailed in her accompanying report that Defendant had excessive excused or some unexcused absences in terms of attendance, and was rated "poor" in terms of participation, specifically noting: "Individual is far below expectations. Individual has been deceptive and seems reluctant to be honest and forthcoming regarding his drug use." CP 70. Ms. Peterson detailed how Defendant continued to use marijuana without documentation from his doctor, which was a concern since his sexual offenses took place while he was heavily involved in marijuana use and even though his wife, a recovering addict, disapproved. CP 71. Ms. Peterson terminated Defendant based on her belief that Defendant

was a risk to reoffend in the community due to his returning drug abuse, specifically noting that Defendant's disregard for red flags, refusal to listen to support people, and lack of honesty with treatment providers and probation officers presented "a very high risk situation" and that she was concerned about his decision-making abilities and actions. Id.

The Court held a revocation hearing on August 31, 2016. RP 117. The Court heard from Defendant's current Community Corrections Officer ["CCO"] Ryan King, DOC Community Corrections Supervisor ["CCS"] Tracy Engdahl, Defendant's sex offender treatment provider Terry Peterson, and the Defendant. RP 118-203.

CCO King testified that successful treatment is the major requirement for compliance with a SSOSA. RP 122. He also testified that part of his job is to watch for indicators of illegal behaviors, relapse, or risks to reoffend and that drug and alcohol use is a common issue indicator of a risk to reoffend. RP 123. CCO King testified that he began noticing issues with Defendant in May of 2016, including disregarding his doctor's orders, overuse of hydrocodone, and use of marijuana against his treatment provider's wishes. RP 124-25. CCO King testified that, despite multiple interventions involving CCS Engdahl, Ms. Peterson, Defendant and Defendant's

wife, Defendant “didn’t seem like he was taking it too seriously.” RP 125-26. CCO King felt like the issues were not resolving and he had exhausted his options with Defendant. RP 126. Defendant was terminated from treatment and DOC lacked the ability to force a treatment provider to continue providing treatment to a terminated individual. RP 127. Because a SSOSA is treatment in lieu of jail time and Defendant was unsuccessfully terminated from treatment, CCO King felt the need to address the violation, which led to the arrest and subsequent petition to revoke SSOSA. RP 126. CCO King testified that despite DOC’s efforts, Defendant failed to recognize the severity of the situation and CCO King felt that Defendant’s behaviors – not following his relapse-prevention plan, not including his support system from his wife, not working with Terry [Peterson] – were all actions or behaviors which put Defendant at a risk to reoffend. RP 128.

CCS Tracy Engdahl testified that Defendant had been supervised out of her unit at DOC since February 2012 – the entire time he had been on supervision. She testified that she had been actively involved in monitoring the issues which culminated in the revocation hearing. RP 138-39. She, along with CCO King, Terry Peterson, and Defendant’s wife worked with Defendant to try to

resolve his issues with use and overuse of marijuana and hydrocodone. RP 142. Despite CCS Engdahl's directive to Defendant that he could not use marijuana, Defendant continued to use. RP 144. CCS Engdahl testified that because DOC had exhausted their options with Defendant and he had been removed from treatment, DOC had no choice but to seek revocation of the SSOSA. RP 145. She further stated that Defendant did not take his supervision seriously and made it seem like it was entirely his wife's issue, which gave her concern about his ability to make good decisions, and was at risk to reoffend by not using his support system and by withholding information that was important to his wife, therapist, and probation officer. RP 145-46. Furthermore, CCS Engdahl was concerned because she believed that Defendant's letter to the Court [CP 111-119] was "full of blaming others and non-acceptance of responsibility, and not even acknowledging that he had a violation at all...he was in deeper denial than I would have expected from him." RP 146. Despite DOC trying to work with Defendant, he simply became "more indignant, more evasive". RP 154.

Terry Peterson, a therapist with 37 years of experience with adult and juvenile offenders, had provided treatment to Defendant

since January of 2013, after Defendant was referred by Edward Averitt. RP 157-58. Ms. Peterson was providing counseling to Defendant as a standard SSOSA condition. RP 158-59. Some of her standard conditions for compliance are attendance, honesty, talking about issues, and plans for how to deal with red flags. RP 159. Defendant had used marijuana when he offended which led Ms. Peterson to identify marijuana as risk factor for Defendant, an assessment with which he disagreed. RP 163. Ms. Peterson was concerned that Defendant was having a relapse in his thought process – not being up front about his use, ignoring his chaperone and wife’s requests, and ignoring his treatment provider’s concerns. RP 163. She believed Defendant was well enough into his cycle of thinking – lying to himself and others – that he wasn’t able to hear the concerns of his support system, which is a crucial aspect to preventing re-offense. RP 164. Defendant’s actions raised red flags for Ms. Peterson, and she believed he was a risk to reoffend. RP 166. “[A] big part of Mr. Novikoff’s offending behavior is tied to marijuana. So that’s my concern.” RP 177.

Despite the extensive testimony from Ms. Peterson and DOC, Defendant continued to minimize their concerns, even at the revocation hearing, referring to their repeated requests for medical

authorization for the marijuana as “wish-wash back and forth about documentation.” RP 186. Defendant also continued to deny the role of marijuana in his offense cycle when questioned by his own attorney:

Q: Are you willing to give up marijuana?

A: You know, I don't see the point. I've got – Like I said, I've got a plan going at the VA, monitored, regularly, with everybody there. –know there as a time in my life when it was a problem, but that's not—

Q: Okay. But Ms. Peterson indicates that's one of the red flags, in regard to your relapse prevention program.

A: That's – that is – There was a time in my life where I used it as a way to escape my confronting issues, and secrets was – secrets – the problem.

RP 199.

After hearing from the parties and conducting a lengthy analysis on the record, the Court determined to revoke Defendant's suspended sentence. RP 222. In arriving at its decision, the Court considered not only the testimony from the hearing, but also (1) Dr. Wert's original evaluation, including Wert's opinion that drugs and alcohol was a risk factor and that marijuana use was ongoing when the offenses were committed, as well as Defendant's history of deviant sexual attraction; and (2) CCO Travis Hurst's original Risk Assessment that did not recommend SSOSA and highlighted the role

of drugs in Defendant's past risky behaviors. RP 217-1.

Defendant now appeals, claiming that the trial court failed to consider sanctions lesser than total revocation of SSOSA, and that the trial court's determination that the Defendant had not made satisfactory progress in treatment was in error.

IV. ARGUMENT

A. THE TRIAL COURT PROPERLY CONSIDERED LESSER ALTERNATIVES TO REVOCATION OF DEFENDANT'S SUSPENDED SENTENCE.

1. Standard of Review on Appeal

Revocation of a suspended sentence due to violations rests within the discretion of the trial court and will not be disturbed absent an abuse of discretion. State v. McCormick, 166 Wn.2d 689, 705-06, 213 P.3d 32 (2009). An abuse of discretion occurs only when the decision of the court is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). It may be an abuse of discretion where, in selecting one particular sentencing option, the court erroneously believes that its alternatives are limited such that it fails to consider other legally available options. State v. Partee, 141 Wn. App. 355, 361-62, 170 P.3d 60 (2007).

2. The Trial Court Considered Lesser Sanctions

The State does not dispute that the statute permits imposition of up to 60 days per violation; that much is clear from State v. Partee¹ and State v. Badger², as well as from the text of RCW 9.94A.670(10)³. However, Defense misinterprets the trial court's ruling. The trial court did not conclude that total revocation was the only available sanction for a violation of a SSOSA such that it failed to consider other alternatives; rather, the trial court concluded that total revocation was the appropriate sanction for *this* type of violation, after considering the available alternatives in *this* case.

The trial court acknowledged that imposition of 60 days can be an option when revoking suspended time on a SSOSA. RP 219.

Also, State v. Miller is a case that I think is helpful here, 180 Wn.App. 413. And in Miller, somewhat different facts, but there basically the defendant was not able to start a treatment program because of a lack of funds. And in effect the trial court there ruled that there had to be revocation. And the court acknowledged there that it was not the defendant's fault, this lack of resources, but on the other concluded that if there's no available treatment program then the defendant goes to prison. That is essentially the conclusion, the holding, in the Miller decision.

And that case, when I read it carefully, instructed the court, trial

¹ 141 Wn.App. 355, 170 P.3d 60 (2007).

² 64 Wn.App. 904, 827 P.2d 318 (1992).

³ "If a violation of conditions other than a second violation of the prohibitions or affirmative conditions relating to precursor behaviors or activities imposed...occurs during community custody, the department shall either impose sanctions as provided for in RCW 9.94A.633(1) [up to 60 days' confinement for each violation] or refer the violation to the court and recommend revocation of the suspended sentence"

court, to see if there's any alternative forms of punishment available. And that would be, as Mr. Morgan has pointed out, perhaps, say, 60 days for a violation would be one option there.

RP 219, citing State v. Miller, 180 Wn.App. 413, 325 P.3d 230 (2014).

The trial court acknowledged that 60 days was an option that it should consider as an alternative to revocation, and it did. After considering that alternative, the Court concluded that imposition of 60 days was not an appropriate alternative when the Defendant did not have the option of going back into sex offender treatment afterward.

[A]nother way to read that would be that if treatment is not available to the court, and if it's not then again the – the position would be revocation and prison.

RP 219. After considering the facts in this case, the trial court found that treatment was not available to the court because the Defendant had been terminated from his treatment program based on a breakdown in the "vital communication" between Defendant and his treatment provider and that the Defendant still presented a risk to the community. RP 221-22. The court also found that, even after three plus years of treatment, the Defendant still did not fully appreciate what the experts in his case were trying to tell him about the role of drug use in the offender cycle and relapse. RP 222. The court even considered what the effect would be of forcing or "pushing" Ms. Peterson to take the Defendant back into treatment, noting that her

answer was “grudgingly, if at all.” RP 221.

Because of the breakdown in the relationship between the Defendant and his treatment provider such that she could not continue to provide treatment, the trial court concluded that the Defendant was an untreated sex offender that presented a risk to the community. Because a 60 day sanction would not serve the purpose of preventing re-offense, as per Miller, the trial court concluded that revocation of the entire suspended sentence was the only available remedy under the specific facts of this case that would ensure the safety of the community. Given that the trial court properly considered alternatives, the trial court did not abuse its discretion by erroneously failing to consider other legally available options.

Defense contends that “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.” However, the trial court’s conclusion that revocation was appropriate was not based on the fact that the defendant had been expelled from treatment, but based on the fact that treatment was no longer available to him because of his unwillingness to do the things required in the treatment program. For this reason, Defendant’s reliance on Partee

and Badger is misplaced.

In Badger, the court granted defendant a SSOSA, but subsequently revoked it after defendant failed to enter sex offender treatment and had unapproved contact with a minor. State v. Badger, 64 Wn.App. at 906. Because the sentencing judge had expressed doubt about whether he had the option to impose up to a 60-day jail sentence in lieu of executing the original sentence, the Court of Appeals remanded to permit the trial court to exercise its discretion to in deciding whether to continue with the original sentence or to impose the 60-day sanction for violation of the sentencing conditions. Id. at 910. Badger, unlike Mr. Novikoff, had simply failed to commence his treatment. Therefore, if, on remand, the trial court had elected to impose 60 days of jail rather than total revocation, the Badger ostensibly had the option of getting into treatment and coming into compliance with the requirements of his SSOSA. Conversely, the trial court in the instant case found that a return to treatment was simply not an option for Mr. Novikoff due to the breakdown in communication and Defendant's unwillingness to utilize his support system, acknowledge symptoms of relapse, and defer to his counselor's advice regarding the role of drug use in his offender cycle.

Partee too, is distinguishable from the instant case. In Partee, the trial court granted defendant a SSOSA, but subsequently revoked it after defendant was terminated from sex offender treatment due to continuing unapproved contact with minors, consumption of alcohol, and having a deceptive polygraph. State v. Partee, 141 Wn.App. at 358-59. At Partee's termination hearing, a different sex offender treatment provider indicated that he did not think Partee was amenable to treatment at that time, but suggested that Partee serve a substantial time in confinement and then be allowed to resume treatment thereafter, opining that the jail time might make Partee amenable to treatment again. Id. at 359. The trial court revoked Partee's suspended sentence in its entirety, opining that it did not have the authority to impose only a portion of the suspended sentence and it did not have the authority to stack multiple probation violations to give the defendant time in DOC. Id. On review, the Court of Appeals, Division II agreed with the Badger appellate court and held that a trial court does have the discretion to impose up to 60 days for each violation in lieu of total revocation of the SSOSA. Id. at 362. The appellate court therefore remanded back to the trial court so it could consider whether to revoke the SSOSA or impose lesser sanctions. Id. at 364.

Unlike the trial in court in Partee who simply did not believe it had the authority to impose lesser sanctions and therefore did not consider them, Judge Nielson here very plainly considered whether a lesser revocation would be appropriate in Mr. Novikoff's case and what the likelihood of success would be with a lesser sanction, as well as the resulting risk to the community. First, he acknowledged that when Defense Counsel "pushed" Ms. Peterson on the question of whether or not she would be willing to take Defendant back, her answer was "grudgingly, if at all". The trial court went on to explain the importance of the "vital communication that's at the heart of this treatment" that was missing and in the end, opined that Defendant's personal issues, as real as they were, "cannot be an excuse here for the breakdown in your treatment." RP 222. The court concluded that the Defendant failed to appreciate the severity of the possibility of relapse and therefore presented a risk to the community. RP 222. "Your thinking about this is not at all clear and focused on what you have accomplished and what is necessary now to limit any risk to the community." RP 223. Finally, the trial court explained why he did not think a short sanction and recommencing treatment was the appropriate disposition:

[W]hen I look at this closely, and believe me, very carefully, I

conclude that I have a real concern about safety if you go back – into the community, given this breakdown in communication. And I do know that much about treatment and the need for complete candor and communication between a provider, treatment provider and somebody that's working with that professional. And that's gone here. And that tells me that there would be a high risk to the community.

RP 226.

The question before the appeals court is not whether the lesser sanction of jail time is an available remedy – that is a question of law which has already been answered in the affirmative by the Courts of Appeal for the Second and Third Division in State v. Partee and State v. Badger, respectively. The question, rather, is whether the trial court's ruling that total revocation was the appropriate sanction for the Defendant under the facts and circumstances presented by this case, and the standard of review for such an issue is whether the trial court abused its discretion.

B. THE TRIAL COURT'S DETERMINATION THAT THE DEFENDANT HAD NOT MADE SATISFACTORY PROGRESS IN TREATMENT WAS NOT AN ABUSE OF DISCRETION.

Under the Sentencing Reform Act of 1981, chapter 9.94A RCW, the trial court may revoke a SSOSA sentence whenever the defendant violates a condition of the suspended sentence or the court finds that the defendant is failing to make satisfactory progress in treatment. State v. McCormick, 166 Wn.2d 689 at 698.

There is no requirement for a finding of willfulness for a violation of a condition that does not involve legal financial obligations or community service obligations. Id. When the offender's violation is a threat to the safety and welfare of society, the sentencing court need not inquire into the reasons for the violation. State v. Miller, 180 Wn.App. at 421. Revocation of a suspended sentence rests within the discretion of the court, and will not be disturbed absent an abuse of discretion. Id. at 705-06; State v. Kuhn, 81 Wn.2d 648, 650, 503 P.2d 1061 (1972). An abuse of discretion occurs only when the decision of the court is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State v. McCormick, 166 Wn.2d at 706; State ex rel. Carroll v. Junker, 79 Wn.2d 12 at 26. Proof of violations need not be established beyond a reasonable doubt but only must "reasonably satisfy" the court the breach of condition occurred. State v. Kuhn, 81 Wn.2d at 650. An appeals court reviews the trial court's findings of fact for substantial evidence. State v. Miller, 180 Wn.App. at 425. Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise. Id.

State v. McCormick examined sufficiency of the evidence in the context of SSOSA revocation. 166 Wn.2d at 705-06. In

McCormick, the trial court revoked McCormick's SSOSA after hearing testimony that McCormick continued to frequent a food bank that was located in an elementary school and connected with a church, after having been told by CCO that he could not go to either churches or school. Id. at 706. On appeal, the Supreme Court held that because the trial court could reasonably conclude that the location of the food bank in a building housing a church school presented a risk to the safety or welfare of society, the trial court had not abused its discretion in revoking McCormick's suspended sentence. Id.

Several other recent Washington cases, although unpublished, offer additional guidance on sufficiency of the evidence issues in SSOSA revocations. For instance, Division One has already addressed this issue twice in 2017. In State v. Lane, the trial court revoked Lane's SSOSA based in part on a stipulated violation of leaving the county without permission from his DOC officer, and in part on Lane's failure to make satisfactory progress in sexual deviancy treatment. State v. Lane, 2017 Wash. App. LEXIS 46*; 2017 WL 176672 (Division 1).⁴ On appeal, Lane

⁴ This is an uncited decision which has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate. GR 14.1; Crosswhite v. Dep't of Soc. & Health Servs., 197 Wn.

asserted that substantial evidence did not support finding he failed to make satisfactory progress in treatment. Id. at *13. In support of his appeal, defendant relied upon his sexual deviance therapist's testimony that he was "making good progress" in the treatment program. Id. at *14. However, the Court of Appeals held that the trial court's findings were supported by substantial evidence and that the trial court had not abused its discretion when it found that Lane was not amenable to treatment because of his "ongoing history of being dishonest", specifically citing Lane's therapist's testimony that the "number one reason" individuals do not successfully complete a deviancy program "is that people aren't truthful, and they don't follow the rules" and that "being open, honest and transparent with both the treatment provider and the CCO is a very important aspect of treatment." Id. at *15. In Lane, as in the present case, the trial court specifically noted the importance of trust between the defendant and the CCO, as well as the importance of honesty on the part of the defendant.⁵ As in Lane, the trial court here found that Mr. Novikoff's failure to be honest was evidence that he was not making satisfactory progress

App. 539, 544, 389 P.3d 731 (2017).

⁵ "[W]e are left in a position where we don't trust. And Mr. Devorss [CCO] understandably does not trust Mr. Lane... [I]t isn't the not getting permission... it's the fact that he lied about it when confronted." Id. at *12.

in treatment. CP 125.

In State v. Wilson, Division 1 again addressed the issue of sufficiency of the evidence to revoke a SSOSA.⁴ 2017 Wash.App. LEXIS 1303 (Division 1). In Wilson, the trial court revoked Wilson's SSOSA after finding that defendant had repeatedly used methamphetamine, lied about his relationships, lied about where he was living, and failed to complete the required sex offender treatment. Id. at *5. Although Wilson's treatment provider testified that he did not see any issues of sexual deviancy and he did not believe Wilson was a danger to the community, the trial court weighed the competing interests of all those affected, noting that the victim and her family "expected Wilson's treatment obligation to be taken seriously and completed." Id. at *4-6. The Court of Appeals held that the trial court's ruling was tenable where the record established that the trial court considered the evidence before it before determining that Wilson's violations constituted a threat to the safety and welfare of society⁶. Id. at *6.

Division Two has also recently addressed the issue of sufficiency of the evidence in SSOSA revocations. State v.

⁶ "Full and proper consideration of all necessary factors was engaged in by the trial judge. There was no judicial error. Wilson's present circumstance is entirely of his own creation." Id. at *7.

Detwiler involved a fact pattern nearly identical to the one presently before this Court. State v. Detwiler, 2016 Wash. App. LEXIS 1139.⁴ In Detwiler, defendant received a SSOSA sentence after admitting to sex with a minor while he was intoxicated. Id. at *2. As in the present case, Detwiler's psychosexual evaluation revealed that he was a daily marijuana user and that abstinence was "key" in controlling his sexual impulses. Id. at *2-3. Also similar to the present case, Detwiler's DOC officer determined that chemical dependency was a contributing factor to Detwiler's risk to reoffend, and recommended against the SSOSA. Id. at *3. Detwiler, like Mr. Novikoff, asked to use marijuana as an alternative to pain medication and claimed to have obtained medical authorization. Id. at *7. However, as in the current case, Detwiler's CCO told Detwiler not to smoke marijuana until he could clarify his supervision conditions. Id. at *6-7. Detwiler continued to use marijuana anyways, leading to the State's motion to revoke SSOSA. Id. at *7.

The trial court revoked Detwiler's SSOSA, finding that smoking marijuana was a "precursor activity or behavior" to Detwiler's crime and a contributing factor to his crime. Id. at *11-13. The Court of appeals held that it was not an abuse of discretion

for the trial court to impose a condition prohibiting defendant from consuming marijuana, and further held that the trial court did not abuse its discretion in revoking Detwiler's SSOSA where consumption of marijuana was prohibited and Detwiler admitted to smoking marijuana, noting:

[T]he CCO expressly directed him not to use marijuana until the sentencing conditions regarding marijuana use could be clarified. Detwiler chose to disregard that directive and used marijuana anyway based on his own incomplete reading of his judgment and sentence.

Id. at *17-19. The trial court in the present case echoed nearly identical concerns in its Findings of Fact and Conclusions of Law, namely that Mr. Novikoff's marijuana use was part of his offense cycle and that Novikoff's decision to continue to use marijuana against his CCO's wishes was problematic. CP 120-127. As in Detwiler, the trial court here found that Defendant violated a condition of his sentence by willfully misusing controlled substances and willfully refusing to comply with the directives of his CCOs, therapist, and chaperone. CP 125. As in Detwiler, the Defendant here admitted his use of marijuana, and therefore, it was not an abuse of discretion for the trial court to revoke his SSOSA based on violation of his sentence.

Division Three also addressed the issue again in State v. Zuvella, 2015 Wash. App. LEXIS 2112.⁴ In Zuvella, defendant's sex offender treatment provider had opined that substance abuse could increase Zuvella's risk level, and the trial court warned defendant that he would have to abstain from drugs as part of his SSOSA. Id. at *2. The State asked the trial court to revoke the SSOSA several times, and the trial court finally did so after defendant's UA tested positive for methamphetamine. Id. at *5. Defendant appealed, claiming that the trial court had failed to exercise its discretion and had relied on untenable grounds in revoking his SSOSA. Id. at *6. Division Three held that the trial court had exercised discretion when it listened to arguments from the State and the defense, as well as Mr. Zuvella individually, and had considered how chronic drug abuse will affect sex offender treatment and increase risk. Id. at *8-9. The Court of Appeals further held that it was not an abuse of discretion to terminate simply because the violations were non-sexual in nature, stating "we look for *any* tenable basis in the record to support the decision." Id. at *9.

Perhaps most directly on point, State v. Miller addresses whether it is an abuse of discretion to revoke a SSOSA when a defendant is not engaged in the required treatment. 180 Wn.App

413, 325 P.3d 230 (2014). In Miller, defendant's SSOSA was revoked because Miller was not in sexual deviancy treatment as required by his sentence. Id. at 416. On appeal, Miller argued that the trial court abused its discretion in revoking the SSOSA because it had not found that his failure to engage in treatment was willful and where he did not have enough money to pay for treatment. Id. On appeal, Division One held that sexual deviancy treatment was a stringent condition related to Miller's crimes that was designed to prevent Miller from reoffending, and because there were no alternative measures that could adequately protect society, the trial court had not abused its discretion by revoking Miller's SSOSA. Id. at 422-24. The Appellate Court further found that there was substantial evidence supporting that if untreated, Miller posed a significant risk to reoffend where the trial court considered defendant's psychological evaluation which indicated that defendant should engage in at least 3 years of sexual deviancy treatment to include relapse prevention in order to mitigate the risk of re-offense. Id. at 425.

When the facts of this case are viewed in light of the precedent set forth by case like McCormick and Miller, as well as non-precedential but persuasive cases like Zuvela, Wilson,

Detwiler, and Lane, it is evident that the trial court here did not abuse its discretion in revoking Mr. Novikoff's SSOSA. Defendant claims that the fact that he had three and half years of compliance prior to revocation renders the trial court's decision to revoke "untenable" because the defendant had made progress "on the whole". However, whether a defendant has made progress on the whole is not the applicable standard; rather an appellate court reviewing a trial court's decision for abuse of discretion must uphold the decision if there is any tenable basis for the trial court's decision. Here, the trial court's determination that Defendant had not made satisfactory progress in treatment was supported by testimony that there had been four months of noncompliance, including overuse of marijuana and hydrocodone, failure to follow the directives of his CCOs, and a lack of honest communication with his support system. CP 125. Furthermore, the trial court found that Defendant's obsessive compulsive traits and traits for disregarding the law concerning illegal drug use had resurfaced. Id. Finally, the trial court found that Defendant had been terminated from treatment. CP 124. Each of these is a tenable ground for the trial court's finding that Defendant failed to make satisfactory progress.

Here, the trial court engaged in a lengthy analysis, including consideration of Mr. Novikoff's original evaluations from both his treatment provider and DOC, testimony from his CCO, CCS, and current treatment provider, testimony from the defendant himself, and argument from counsel for both parties. The trial court incorporated these considerations into its determination that Mr. Novikoff presented a risk to the public if he remained untreated in the community. The trial court further explained why forcing Mr. Novikoff back into treatment with Ms. Peterson was not likely to result in successful treatment. And finally, the trial court acknowledged that Mr. Novikoff had admitted to smoking marijuana in violation of his sentence, and against his CCO's directives. Any one of these findings is a tenable basis in and of itself on which the court could revoke Defendant's SSOSA; the combination of them all together is far more than enough to meet the legal requirement. Moreover, the trial court's findings were supported by substantial evidence where each finding was based on testimony presented at the revocation hearing, or evidence in the case record.

E. CONCLUSION

The trial court engaged in a lengthy oral analysis during the revocation hearing as well as issued comprehensive findings of fact

and conclusions of law. Unlike Partee or Badger, the trial court never expressed any doubt that it had the authority to impose lesser sanctions if appropriate. However, the trial court's decision to revoke the SSOSA hinged upon the fact that the Defendant's relationship with his treatment provider had been damaged to such an extent as to be irreparable, and the trial court was unwilling to force Defendant's treatment provider to "take him back" where the treatment provider was only "grudgingly" willing to do so, and where the trial court found that the Defendant had not made satisfactory progress in treatment because he had made no progress in four months, was overusing controlled substances, was not following directives of his CCOs, and was not honestly and completely communicating with his CCOs, his therapist, and his wife (chaperone). The trial court found that the Defendant presented a risk to reoffend based on his failure to comply with treatment and that revocation of his SSOSA was necessary in this situation to protect public safety.

Because Judge Nielson properly considered alternatives to revocation and properly weighed all the evidence, including prior reports and evaluations, as well as current testimony from Defendant's CCOs and therapist, and the Defendant, and because

Judge Nielson's finding that Defendant had not made satisfactory progress was supported by testimony and facts in the record, the trial court did not abuse its discretion in revoking Defendant's suspended SSOSA sentence in its entirety. Because the trial court did not abuse its discretion, the State respectfully requests that this Court deny Defendant's motion to strike the trial court's finding that the Defendant had not made satisfactory progress and deny Defendant's motion to remand to the trial court.

Dated this 14 day of August, 2017

Respectfully Submitted by:



KATHRYN BURKE, WSBA #44426
Prosecuting Attorney

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on August 14, 2017, I mailed and/or e-mailed a copy of the Respondents Brief in this matter, pursuant to the parties' agreement, to:

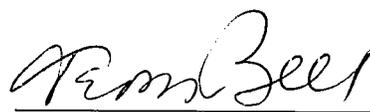
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Superior Court Case Number: 11-1-00050-8

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