

FILED
Court of Appeals
Division III
State of Washington
3/18/2019 1:57 PM

NO. 36186-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

NATHAN DEYARMIN,

Appellant.

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

The Honorable Tina L. Kernan, Judge

BRIEF OF APPELLANT

KEVIN A. MARCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignmetns of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	3
C. <u>ARGUMENT</u>	11
1. DEYARMIN WAS DENIED DUE PROCESS BECAUSE THE STATE FAILED TO NOTIFY HIM THAT IT SOUGHT TO REVOKE HIS SSOSA ON THE BASIS THAT HE FAILED TO MAKE REASONABLE PROGRESS IN TREATMENT	11
2. THE TRIAL COURT MISAPPREHENDED THE PERTINENT FACTS BEFORE IT, THEREBY ABUSING ITS DISCRETION IN REVOKING DEYARMIN’S SSOSA	19
3. REMAND IS NECESSARY EVEN IF THIS COURT DETERMINES ONE OF THE BASES FOR REVOKING THE SSOSA IS VALID	24
4. ILLEGAL COMMUNITY CUSTODY CONDITIONS MUST BE STRICKEN FROM THE JUDGMENT AND SENTENCE	26
a. <u>The trial court exceeded its statutory authority in prohibiting Deyarmin from using or possessing controlled substances without a written prescription from a licensed physician</u>	26
b. <u>The community custody condition prohibition possession of “any pornography, in any form” is unconstitutional</u>	27

TABLE OF CONTENTS (CONT'D)

	Page
5. THE SHERIFF'S FEE, CRIMINAL FILING FEE, AND DOMESTIC VIOLENCE ASSESSMENT SHOULD BE STRICKEN FROM THE JUDGMENT AND SENTENCE ..	29
D. <u>CONCLUSION</u>	32

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Det. of Cross</u> 99 Wn.2d 373, 662 P.2d 828 (1982).....	13, 14, 15, 17
<u>In re Marriage of Littlefield</u> 133 Wn.2d 39, 940 P.2d 1362 (1997).....	19
<u>In re Welfare of H.S.</u> 94 Wn. App. 511, 973 P.2d 474 (1999).....	12, 19
<u>State v. Abd-Rahmaan</u> 154 Wn.2d 280, 111 P.3d 1157 (2005).....	25
<u>State v. Bahl</u> 164 Wn.2d 739, 193 P.3d 678 (2008).....	26, 28, 29
<u>State v. Blazina</u> 182 Wn.2d 827, 344 P.3d 680 (2015).....	30
<u>State v. Bourgeois</u> 72 Wn. App. 650, 866 P.2d 43 (1994).....	25
<u>State v. Dahl</u> 139 Wn.2d 678, 990 P.2d 396 (1999).....	12, 13, 14, 17, 18, 25
<u>State v. Gaines</u> 122 Wn.2d 502, 859 P.2d 36 (1993).....	25
<u>State v. Goss</u> 56 Wn. App. 541, 784 P.2d 194 (1990).....	11
<u>State v. Halstien</u> 122 Wn.2d 109, 857 P.2d 270 (1993).....	28
<u>State v. McCormick</u> 166 Wn.2d 689, 213 P.3d 32 (2009).....	11, 12, 27

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Padilla</u> 190 Wn.2d 672, 416 P.3d 712 (2018).....	29
<u>State v. Quismundo</u> 164 Wn.2d 499, 192 P.3d 342 (2008).....	12
<u>State v. Ramirez</u> 191 Wn.2d 732, 426 P.3d 714 (2018).....	30, 31
<u>State v. Sanchez Valencia</u> 169 Wn.2d 782, 239 P.3d 1059 (2010).....	28
<u>State v. Sims</u> 171 Wn.2d 436, 256 P.3d 285 (2011).....	26
<u>Wynn v. Earin</u> 163 Wn.2d 361, 181 P.3d 806 (2008).....	27

FEDERAL CASES

<u>Cole v. Arkansas</u> 333 U.S. 196, 68 S. Ct. 514, 92 L. Ed. 644 (1948).....	13
<u>Memphis Light, Gas & Water Div. v. Craft</u> 436 U.S. 1, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978).....	15
<u>Morrissey v. Brewer</u> 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).....	12

RULES, STATUTES AND OTHER AUTHORITIES

D. BOERNER, SENTENCING IN WASHINGTON § 2.5(c) (1985).....	11
GR 34.....	30
LAWS OF 2018, ch. 269, § 6.....	31
LAWS OF 2018, ch. 269, § 17.....	31

TABLE OF AUTHORITIES (CONT'D)

	Page
RCW 9.94A.670	3, 11, 15
RCW 9.94A.703	27
RCW 10.01.160	30, 31
RCW 10.99.080	31
RCW 36.18.020	31
RCW 71.05.290	14

A. ASSIGNMENTS OF ERROR

1. The trial court's revocation of Nathan Daniel Deyarmin's special sex offender sentencing alternative (SSOSA) violated his due process right to notice.

2. The trial court erred in misapprehending the pertinent facts and misapplying the law based on that misapprehension when it revoked Deyarmin's SSOSA.

3. Even if the trial court had a valid basis to revoke the SSOSA, remand is still required because this basis is inextricable from invalid bases.

4a. The community custody condition prohibiting Deyarmin's possession of controlled substances unless prescribed by a licensed physician exceeded the trial court's statutory authority.

4b. The community custody condition prohibiting Deyarmin's possession of pornography in any form is unconstitutionally vague.

5. The trial court erred in imposing discretionary legal financial obligations (LFOs) without a meaningful inquiry into Deyarmin's ability to pay.

Issues Pertaining to Assignments of Error

1. The State argued at the SSOSA revocation hearing that Deyarmin violated conditions of the SSOSA and that his behavior demonstrated that he had failed to make progress in treatment. Was

Deyarmin denied due process when the State provided him written notice that it sought revocation on the basis that he violated the conditions of his SSOSA but not that he failed to make reasonable progress in treatment?

2. Did the trial court misapprehend several pertinent facts to the issue of SSOSA revocation such that its revocation constituted an abuse of discretion?

3. The trial court's finding that Deyarmin committed new criminal offenses as a basis for revoking the SSOSA was inextricably linked to other findings, such as his failure to make progress in treatment and concerns over an "escalation" in mental health issues. The trial court did not specify it would revoke the SSOSA solely on the commission of new criminal offenses. Is remand for a new hearing required in such circumstances?

4a. Did the trial court exceed its statutory authority in ordering Deyarmin not to consume or possess controlled substances "unless prescribed by [a] licensed practicing physician" where Washington law allows many others than just licensed physicians to write lawful prescriptions?

4b. Must the condition prohibiting Deyarmin from possessing "any pornography, in any form" be stricken because it is unconstitutionally vague?

5. Did the trial court err in imposing certain LFOs, requiring at minimum a hearing on Deyarmin's ability to pay these LFOs?

B. STATEMENT OF THE CASE

Deyarmin was charged with child molestation in the first degree and pleaded guilty in November 2012. CP 7, 11-20.

In its presentence investigation, the Department of Corrections (DOC) recommended a SSOSA. CP 23-35. The investigation was largely based off of Deyarmin's psychosexual evaluation, during which Deyarmin admitted he struggled with sexual attraction to children and girls between the ages of five and 12 specifically. CP 28-29. In addition to discussing the alleged victim that led to the State's charges in this case, Deyarmin indicated he had had sexual contact with a nine-year-old niece as well as other inappropriate contacts with other children. CP 28-29. Based on Deyarmin's candor and "taking responsibility for his behavior," DOC determined Deyarmin was amenable to treatment and therefore recommended a SSOSA. CP 29.

In February 2013, the trial court imposed a 60-month minimum and a lifetime maximum indeterminate sentence, but suspended it pursuant to a SSOSA under RCW 9.94A.670. CP 39. Deyarmin was required to complete a five-year outpatient sex offender treatment program at Valley Treatment Specialties, serve 365 days in total confinement, and obtain and maintain employment. CP 39. The judgment and sentence included other conditions,

including that Deyarmin “Shall commit no crimes” and “Obtain and maintain gainful employment at an approved location that will not place defendant in the proximity of minor children or in any other way place him potential violation of his supervision [sic].” CP 45, 47. Deyarmin was also prohibited from using the internet and from possessing “any pornography, in any form.” CP 48. He also was prohibited from consuming or possessing any controlled substance unless it was prescribed by a licensed practicing physician. CP 47.

Deyarmin’s treatment proceeded without incident until March 9, 2015, when a DOC report was filed. CP 51-53. The report indicated possible deception in Deyarmin’s answers to polygraph questions regarding recent unreported sexual contacts, private contacts with minors, and viewing of “X-rated pornography.” CP 51. Deyarmin stated he held the door open at a gas station for a 15-year-old boy but denied any other contacts with minors or sexual contacts in general. CP 51-52. Deyarmin also admitted to using his friend’s computer and accessing the internet, but only to look up an address so that he could write to an incarcerated friend. CP 51-52.

The report indicated that Deyarmin’s sex offender treatment providers were aware of the failed polygraph but “advised that Mr. Deyarmin is trying hard and she would like to see this violation be addressed as a treatment matter” CP 52. The providers also recommended that Deyarmin needed follow-up with mental health treatment. CP 52. In the end, DOC recommended that

Deyarmin maintain his current treatment program because he was currently compliant. CP 52. However, DOC “would recommend that the Court enter a Modified Order imposing a condition on Mr. Deyarmin’s case to abide by all mental health treatment, as directed by Valley Treatment Specialties, the Washington State Department of Corrections and/or any other certified mental health treatment program.” CP 52. No mental health modification to Deyarmin’s SSOSA ever occurred.

DOC filed a notice of violation on April 27, 2018. CP 54-58. The report stated Deyarmin had committed the crimes of second degree malicious mischief and disorderly conduct in violation of his “commit no crimes” condition. CP 55. Apparently, Deyarmin had been reported as “mega drunk,” running around the streets of Clarkston, rambling about the same thing over and over in a possible “excited delirium” case. CP 55. Deyarmin, while running in the streets, jumped onto a car, shattering a windshield and denting the hood. CP 55-56. Deyarmin also was reported to have “kept ranting without taking breaths” about it being the day after April 20, “which is a national day of recognition for a time to smoke marijuana.” CP 55. Deyarmin also “stated God was there as he was a sex offender and had raped kids to include his own daughter with his finger.” CP 56. The DOC report also alleged that Deyarmin had been fired from his employer for walking off the

“job site to address his mental health,” which, according to DOC, violated his sentencing condition to obtain and maintain employment. CP 56.

The DOC report also contained investigation completely unrelated to Deyarmin’s alleged crimes and nonemployment. For instance, it reports that Deyarmin had a minor violation for leaving the State to assist his mother in Lewiston, Idaho after her car collided with a deer. CP 56. “This violation appeared fairly benign in nature.” CP 56. The report also indicated Deyarmin had been negative for substances for each of the approximately 33 urine samples he had submitted; however, he indicated he had been using marijuana, which DOC did not consider violative of any condition. CP 56-57. Deyarmin had recently lost his housing and was staying at a motel and had a significant unpaid bill there. CP 58.

The DOC report also attempted to characterize Deyarmin’s recent treatment progress. According to treatment providers, Deyarmin was actively working on relapse prevention assignments and agreed to try aversion therapy to assist with decreasing his compulsive behaviors to have or watch movies—seemingly mainstream, widely available commercial movies—with children in them. CP 57. The treatment provider also indicated Deyarmin “does not appear to be pursuing” a referral for mental health treatment and also was in arrears with respect to paying for sex offender treatment services at Valley Treatment Specialties. CP 57. Deyarmin was also reported to have

masturbated “to thoughts of his victim as well as other minor aged individuals” but less frequently now than before. CP 57. Deyarmin also made comments to DOC personnel that “he was a serial child molester and had 40 child victims during his conversation.” CP 58. DOC concluded that although Deyarmin was compliant and successful in treatment attendance and participation, his inability to pay for treatment may lead to unsuccessful discharge from the program. CP 58.

The State moved to revoke the SSOSA, alleging that Deyarmin violated his conditions by “committ[ing] additional crimes and ha[ving] been terminated from employment.” CP 59. The State did not include any allegations that Deyarmin had not made progress in treatment.

Several hearings were held and continued. 2RP¹ 3-16. When the parties and the court reached the substance of the issue, the State mentioned Deyarmin’s additional offenses (malicious mischief and disorderly conduct) and unemployment as secondary concerns, focusing primarily on its concerns including

his compulsive behaviors having watching -- having or watching movies with children in them, buying inappropriate movies, sexual preoccupation and -- issues with self-regulation, deviant sexual arousal and mental health problems are all impacting his risk level. There are indications in that

¹ Deyarmin refers to the verbatim reports of proceedings as follows: 1RP—sentencing proceedings dated February 5, 2013; 2RP—consecutively paginated transcripts dated May 7, 21, 31, and June 18, 2018.

report about Mr. Deyarmin masturbating to thoughts of his child victim as well as other minor-aged individuals.

2RP 15. Notably, again, the State did not include any type of allegation that Deyarmin was not adequately progressing in treatment.

Defense counsel indicated that she could not produce Deyarmin's employer or sex offender treatment provider, but also stated she was prepared to go forward based on the interviews she had conducted with them. 2RP 16-17. The State asked to move forward without the testimony of those witnesses because Deyarmin had indicated

[i]n the course of his counseling and treatment . . . that there are over 40 . . . other child victims The fact that he has that many child victims, the fact that he is watching movies for sexual arousal with children in them, the fact that he's masturbating to thoughts of children including the victim, the child that he molested in this case is one of his masturbatory fantasies.

2RP 17. The State also later said that with regard to Deyarmin's comments about being a serial child molestation with 40 victims, "If that isn't enough to send a chill up anyone's back I don't know what is." 2RP 22.

Defense counsel responded by noting that the treatment provider viewed Deyarmin's candor as a positive attribute: "the only way treatment works i[s] if . . . people are willing to be honest and open about what they're going through Dr. Wren said when those issues come up the answer is a higher level of treatment. You don't just kick someone out of the program."

2RP 19. Counsel also noted that Deyarmin's treatment provider "would take

him back in a heartbeat but they would provide a higher level of care and supervision of him.” 2RP 19.

Defense counsel further emphasized Deyarmin’s need for mental health treatment, which “wasn’t really an aspect of the [S]SOSA.” 2RP 19.

According to the treatment provider,

she has noticed mental health issues and that if he did have a case manager and the mental health treatment we would be able to take care of these issues before it came to the point where he was found running in the street, having a mental breakdown. I honestly think it was the system that partly failed him because he wasn’t getting -- the level of care and services that he needed.

2RP 20.

With regard to Deyarmin’s loss of employment, defense counsel confirmed after speaking to Deyarmin’s employer that “he did believe that Mr. Deyarmin was having mental health issues right before he walked of the job” and otherwise “had wonderful things to say about Mr. Deyarmin.” 2RP 20. Thus, defense counsel asked that the SSOSA not be revoked but modified to allow Deyarmin to seek inpatient mental health treatment. 2RP 20-21.

The State responded with more of the same fearmongering argument, noting Deyarmin’s questionable polygraph results, his reports of multiple victims, and thoughts while masturbating. 2RP 21-22. The State also noted that similar issues came up in the March 2015 report, Deyarmin was given another chance, and his mental health issues had not resolved, “[s]o apparently

this is an ongoing thing.” 2RP 21-23. Because mental health treatment was recommended in the March 2015 report, the State asserted, “So the mental health issue has been out there. To say that this is something that they hadn’t planned for or they hadn’t considered is -- is -- contradicted by the record.”

2RP 23-24.

The trial court revoked the SSOSA, stating,

Well this case is definitely concerning and there is a lot of risk for Mr. Deyarmin. But I do have to agree with the state. All of the facts cited by the DOC in the most recent report and the new charges are very concerning.

And you’ve had a lot of time. This [S]SOSA was initially granted on February 5th, 2013. You had effectively a second chance in March of that year, also, and the concerns to be escalating, as the DOC is saying in their report.

The escalation is really concerning to me. And I have to agree that the mental health issues were there before. They could have been addressed, they weren’t addressed. And I think there is ample evidence now that requires me to revoke your [S]SOSA.

So I am doing that at this time.

2RP 24. In the court’s written order, the court found “The Defendant is in violation of sentence by committing new criminal offenses.” CP 66. Deyarmin timely appeals. CP 68-70.

C. ARGUMENT

1. DEYARMIN WAS DENIED DUE PROCESS BECAUSE THE STATE FAILED TO NOTIFY HIM THAT IT SOUGHT TO REVOKE HIS SOSA ON THE BASIS THAT HE FAILED TO MAKE REASONABLE PROGRESS IN TREATMENT

A first-time sex offender may be eligible for a suspended sentence under the SSOSA provisions of RCW 9.94A.670. “SSOSA was created because it was believed that for certain first-time sexual offenders, ‘requiring participation in rehabilitation programs is likely to prove effective in preventing future criminality.’” State v. Goss, 56 Wn. App. 541, 544, 784 P.2d 194 (1990) (quoting D. BOERNER, SENTENCING IN WASHINGTON § 2.5(c) (1985)).

A trial court may revoke a SSOSA only if the offender (1) violates the conditions of the suspended sentence or (2) fails to make satisfactory progress in treatment. RCW 9.94A.670(11). Otherwise, revocation constitutes an abuse of discretion. State v. McCormick, 166 Wn.2d 689, 705-06, 213 P.3d 32 (2009). A court necessarily abuses its discretion if its ruling rests on facts unsupported in the record or was reached by applying the wrong legal standard. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). Once a SSOSA is revoked, the original sentence is reinstated. State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999).

The revocation of a suspended sentence is not a criminal proceeding but an extension of the original conviction. McCormick, 166 Wn.2d at 699. Accordingly, the due process rights afforded at a revocation hearing are not the same as those afforded at the time of trial. Dahl, 139 Wn.2d at 683. Individuals facing SSOSA revocation are entitled to the same due process rights as those afforded during the revocation of probation or parole. Id. These rights include

(a) written notice of the claimed violations; (b) disclosure to the parolee of the evidence against him; (c) the opportunity to be heard; (d) the right to confront and cross-examine witnesses (unless there is good cause for not allowing confrontation); (e) a neutral and detached hearing body; and (f) a statement by the court as to the evidence relied upon and the reasons for the revocation.

Id. (emphasis added) (citing Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)).

“Due process requires that the State inform the offender of the specific violations alleged and the facts that the State will rely on to prove those violations.” Id. at 685. “A proceeding begun on one ground and continued on another, without any opportunity to define and contest the new allegations, constitutes a fundamental deprivation of due process.” In re Welfare of H.S., 94 Wn. App. 511, 522, 973 P.2d 474 (1999) (citing Cole v. Arkansas, 333 U.S. 196, 68 S. Ct. 514, 92 L. Ed. 644 (1948); In re Det. of Cross, 99 Wn.2d 373, 384-85, 662 P.2d 828 (1982)).

In Dahl, the trial court revoked the SSOSA, noting Dahl's poor performance in treatment, which was possibly caused by cognitive and physical impairments. 139 Wn.2d at 682. Dahl appealed, asserting he received inadequate notice because the only ground alleged as a basis for revocation was his failure to make reasonable progress in treatment. Id. at 683-84. Dahl asserted the revocation petition should have also listed two specific incidents—which the court considered in revoking the SSOSA—as independent violations.² Id. at 684.

The supreme court rejected Dahl's argument because the two incidents were not, by themselves, violations that served as grounds for revocation. Id. Rather, they were examples of Dahl's failure to make progress in treatment—"taken into account for the purpose of assessing Dahl's overall treatment progress." Id. Dahl was ultimately "informed of the State's contention that he had failed to make reasonable progress in his treatment program." Id. at 685. He was also given copies of the treatment reports, which detailed the two incidents as cause for serious concern. Id. at 685-86. "Given that the State notified Dahl both of his alleged SSOSA violation and of the facts supporting the State's claim," the court held Dahl received constitutionally adequate notice. Id. at 686.

² The two incidents concerned Dahl's apparent "exposure" of his penis to two young girls and a sexually graphic note Dahl sent to a bank teller.

Cross provides a useful contrast to Dahl. Cross was a gravely disabled person involuntarily committed for less restrictive outpatient treatment, with several specific conditions. Cross, 99 Wn.2d at 375. The State petitioned to revoke her less restrictive treatment, alleging only that she failed to comply with the condition that she take her prescribed medication. Id. The commission found the State failed to prove this allegation, but nevertheless ordered Cross to return to inpatient status because it would be dangerous to allow her to remain free. Id. at 375-76.

The supreme court reversed in part because the State did not provide Cross adequate notice of the alternative grounds on which her less restrictive treatment could be revoked. Id. at 384-85. Before revocation, the State must provide the individual with a petition that “summarize[s] the facts which support the need for further confinement” and “describe[s] in detail the behavior of the detained person which supports the petition.” Id. at 382 (quoting RCW 71.05.290(2)). The Cross court concluded this required “a statement of all alternative grounds on which revocation or modification is sought.” Id. The court explained the central purpose of notice is “to apprise the affected individual of, and permit adequate preparation for, an impending hearing.” Id. (quoting Memphis Ligh, Gas & Water Div. v. Craft, 436 U.S. 1, 14, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978)). The petition must therefore “indicate the issues which will be addressed at the hearing.” Id.

Cross was given notice that the State sought revocation of her less restrictive treatment on the basis that she failed to comply with its conditions. Id. at 383. But Cross was not given notice of any other grounds. Id. “This failure to state each of the alternative grounds on which respondents sought to detain Ms. Cross violated the statutory notice requirements described above.” Id. at 383-84. Had she been given adequate notice, she might have presented her defense quite differently. Id. at 384; see also id. at 383 (collecting federal cases that establish that “a person whom the state seeks to have civilly committed must be given adequate notice, including notice of the grounds upon which the proposed detention is justified”).

A SSOSA may be revoked for two reasons: (1) the individual violates the conditions of his suspended sentence, or (2) the court finds the individual is failing to make satisfactory progress in treatment. RCW 9.94A.670(11). In the written violation report and in the State’s motion that followed, the State alleged only that Deyarmin had violated the conditions of his SSOSA by committing crimes and not maintaining employment. CP 55, 59. The State did not allege Deyarmin failed to make progress in treatment.

At the revocation hearing, however, the State repeatedly argued and the trial court relied on the unalleged basis that Deyarmin failed to make progress in treatment. The State opted to focus on Deyarmin’s reports of sexual arousal and fantasies toward children and, based on these reports,

claimed, “The community needs to be protected from Mr. Deyarmin. And the [S]SOSA is not working.” 2RP 18. The State also claimed that based on Deyarmin’s admissions to his counselors, “the court has certainly got to be concerned when you have someone who’s engaging in this kind of behavior.” 2RP 18. The State also asserted that Deyarmin had had the opportunity to engage in mental health treatment but failed to do so, his sexual fantasies had been an “ongoing thing,” and that the ongoing pattern, including “the strangeness of this incident that gives rise to the new criminal charges” required revocation. 2RP 22-24.

The trial court, in revoking the SSOSA, relied on the unalleged basis that Deyarmin failed to make progress in treatment. 2RP 24. The trial court specifically relied on “[a]ll of the facts cited by the DOC in the most recent report and the new charges are very concerning.” 2RP 24 (emphasis added). The fact that the court relied on all the facts alongside the new charges shows that it relied on the State’s allegation made for the first time at the revocation hearing that Deyarmin failed to progress in treatment. The trial court also characterized the contents of the report as an “escalation” which was “really concerning.” 2RP 24. The court noted that Deyarmin had had a lot of time on the SSOSA, indicating that “the mental health issues were there before. They could have been addressed, they weren’t addressed.” 2RP 24. This also shows that the court’s primary concern was not the alleged new criminal

charges but Deyarmin's unalleged failure to make progress in treatment. And, although the court referenced the new criminal charges, the trial court's statements indicate that it saw the criminal charges as symptoms of Deyarmin's failure to progress in treatment rather than independently requiring revocation.

Reading Dahl and Cross together demonstrate the State must provide an individual with written notice of all the alternative grounds on which it seeks to revoke a SSOSA. The State was therefore required to give Deyarmin written notice that it sought revocation on the basis that he failed to make progress in treatment, given his continued sexual fantasies about children. However, the State notified Deyarmin only that it sought revocation on the basis that he violated SSOSA conditions. This failure to state each of the alternative grounds for revocation violated the due process notice requirements of Dahl.

Had Deyarmin been given notice that the State alleged he failed to make progress in treatment, he might very well have prepared his defense differently. See Cross, 99 Wn.2d at 384. His attorney indicated she did not have his treatment provider or employer present to testify because of scheduling issues and her "high caseload." 2RP 16. Had Deyarmin been explicitly notified that failure to make progress in treatment and in addressing mental health issues was a reason to revoke, it is unlikely that defense counsel

would have acquiesced in not presenting this testimony. 2RP 16-17 (defense counsel halfheartedly requesting a continuance but agreeing to “move forward based on the information that I’ve gathered”). Rather, defense counsel would have ensured that these witnesses were available to testify that Deyarmin had successfully engaged and progressed in treatment. Without proper notice, Deyarmin did not have an opportunity to adequately prepare for the revocation hearing and tailor his evidence accordingly.

This case is distinguishable from Dahl. The bottom line there was Dahl received notice the State sought revocation based on failure to progress in treatment. 139 Wn.2d at 684. Dahl also received notice of the factual basis for that allegation through the treatment reports. Id. at 685. And the two specific incidents were used only as examples of Dahl’s lack of progress in treatment.

By contrast, the State gave notice to Deyarmin that it sought revocation of his SSOSA solely on the basis that he violated a specific condition. CP 55, 59. Although the DOC report contained additional information about Deyarmin’s progress in treatment and disclosures about watching movies with children and masturbating to thoughts about children, the fact that Deyarmin was candidly disclosing these treatment-related issues shows progress in treatment, not a lack of progress. And the DOC report did not even flag these treatment-related issues as part of its “SUPPORTING

EVIDENCE” for the “VIOLATION(S) SPECIFIED” but only in an “ADJUSTMENT” section. CP 55-56. The State did not raise Deyarmin’s lack of progress until the revocation hearing. This is precisely the forbidden scenario where a proceeding begins on one ground and continues on another, without an opportunity “to define and contest the new allegations.” H.S., 94 Wn. App. at 522. Because the State failed to provide Deyarmin with adequate notice of all alternative grounds on which it sought SSOSA revocation, the revocation order should be reversed.

2. THE TRIAL COURT MISAPPREHENDED THE PERTINENT FACTS BEFORE IT, THEREBY ABUSING ITS DISCRETION IN REVOKING DEYARMIN’S SSOSA

A trial court abuses its discretion if its legal decision rests on a misunderstanding of the pertinent facts on which to exercise discretion. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) (a decision is “based on untenable reasons” if it is “based on an incorrect standard or the facts do not meet the requirements of the correct standard”). In determining the DOC report showed a “concerning” “escalation” and in finding that the Deyarmin’s mental health issues “could have been addressed” but “weren’t addressed,” the trial court abused its discretion. 2RP 24.

In response to Deyarmin’s arguments that he was experiencing a mental health breakdown, which led to his commission of malicious mischief and disorderly conduct, the State asserted that the 2015 DOC report showed

that “the mental health issues has been out there. To say that this is something that they hadn’t planned for or they hadn’t considered is . . . contradicted by the record.” 2RP 24. The trial court seemed to fully adopt this reasoning: “I have to agree that the mental health issues were there before. They could have been addressed, they weren’t addressed.” 2RP 24.

Contrary to the trial court’s recitation of pertinent facts, the March 2015 DOC report does not establish that mental health issues were ever made part of Deyarmin’s SSOSA plan; the March 2015 DOC report establishes the opposite. The March 2015 report certainly discusses Deyarmin’s potential mental health issues, including his providers’ recommendation that “Mr. Deyarmin needed to follow-up with Quality Behavioral Health for mental health.” CP 52. Deyarmin also had an appointment to seek mental health programming in early April 2015. CP 52. But the March 2015 is clear that Deyarmin’s mental health issues—whatever they were and whatever they are—were never formally addressed as part of his SSOSA, despite recommendations and possible appointments. The DOC employee who drafted the report stated,

I am completing this report to notify the Court of the behavior and recommendation(s) of the treatment provider. I would recommend that the Court enter a Modified Order imposing a condition on Mr. Deyarmin’s case to abide by all mental health treatment, as directed by Valley Treatment Specialties, the Washington State Department of Corrections and/or any other certified mental health treatment program.

CP 52. No modified order imposing mental health treatment as a condition of Deyarmin's SSOSA was ever entered. Instead, Deyarmin was allowed to languish without mental health treatment. As defense counsel argued,

[M]ental health treatment wasn't really an aspect of the [S]SOSA, and [Deyarmin's treatment provider] believes that he should be engaged in mental health treatment and it's also her opinion that he should have a case manager. I'm not exactly sure how that all works but she said that there is a way in which he would have a case manager and they would make sure that his mental health is kept in check.

[Deyarmin's treatment provider] did tell me that she has noticed mental health issues and that if he did have a case manager and the mental health treatment we would be able to take care of these issues before it came to the point where he was found running in the street, having a mental breakdown. I honestly think it was the system that partly failed him because he wasn't getting -- the level of care and services that he needed.

2RP 19-20.

Defense counsel was correct, not the prosecutor or the trial court. In March 2015, DOC and Deyarmin's treatment providers flagged Deyarmin's potential mental health as an issue that should be addressed as part of the SSOSA. DOC specifically recommended mental health treatment by required by way of modified order. Yet none of this happened, and Deyarmin continued to progress in his SSOSA without any requirement that he address or obtain treatment for any mental health issues outside of his sex offender treatment.

Thus, the State's argument and the trial court's decision that Deyarmin failed to address his mental health issues is factually incorrect and, as a basis for revoking his SSOSA, unfair. Despite mental health treatment recommendations from Deyarmin's treatment providers and from DOC, the prosecutor's office did not seek an order requiring Deyarmin to enter mental health treatment. Nor did a superior court judge sign such an order. Thus, if mental health issues "could have been addressed," the reason they "weren't addressed" was because of the prosecuting authority's and trial court's failure to see that they were addressed. By blaming Deyarmin for not obtaining the mental health treatment that he was never ordered to obtain, the trial court's ruling that Deyarmin's failed to address mental health issues is untenable. The court's failure to ascertain the pertinent facts and apply them using the appropriate legal standard was an abuse of discretion.

The same can be said of the trial court's determination that Deyarmin's behavior represented an "escalation." An escalation of what is unclear, but it seems the court meant either Deyarmin's increasingly candid admissions regarding his continuing sexual fantasies regarding children or his mental health problems. If the former, as defense counsel asserted, "So expect that someone's not going to have fantasy, they're not going to have issues that have arisen, that just doesn't make sense. Those are going to happen if you've got these sorts of issues and you're going through treatment." 2RP 19. Defense

counsel also stated the treatment provider “said when those issues come up the answer is a higher level of treatment. You don’t just kick someone out of the program. The correct reaction is to give a higher level of care.” 2RP 19. The treatment provider also indicated “that the only way treatment works [is if] people are willing to be honest and open about what they’re going through. He wouldn’t be on a [S]SOSA if he didn’t have issues that he’s dealing with.” 2RP 19. If the trial court meant to revoke Deyarmin’s SSOSA because his sexual fantasies had “escalated” despite treatment, then the trial court missed that discussing and addressing such fantasies *was* treatment. The trial court failed to articulate a tenable basis for revocation.

If the trial court’s “escalation” remark referred to Deyarmin’s mental health problems, the trial court failed to apprehend that Deyarmin was never required to undergo mental health treatment, as noted. Thus, he could not have escalated his mental health issues despite treatment, as the trial court’s remarks seemed to suggest. Rather, his mental breakdown was a result of never having received the treatment that the trial court mistakenly believed he had received. By failing to inform itself as to the pertinent facts on which to exercise discretion, the trial court abused its discretion.

Finally, although the trial court’s written order states that it was revoking Deyarmin’s SSOSA solely on the basis of “committing new criminal offenses,” CP 66, the record demonstrates that the court saw the new criminal

offenses as part of the “escalation” of Deyarmin’s concerning behavior. 2RP

24. The new offenses—malicious mischief and disorderly conduct for running in the street and randomly jumping on cars in Clarkston—were not of a sexual nature and did not shed any light of his statements related to molesting or fantasizing about children. The new charges may indicate mental health issues, however. As discussed, to the extent the charges showed mental health issues, they did not show an escalation in mental health issues because no baseline for mental health had ever been established. No baseline had ever been established because no mental health treatment had ever been ordered. Thus, the trial court’s reliance on the commission of new crimes as part of some escalation in behavior is not supported by the pertinent facts. In failing to ascertain the pertinent facts, the trial court abused its discretion. The SSOSA revocation order should be reversed.

3. REMAND IS NECESSARY EVEN IF THIS COURT DETERMINES ONE OF THE BASES FOR REVOKING THE SSOSA IS VALID

Even if the court determines that one basis for revocation is valid, remand is still necessary. In reversing a SSOSA revocation, the Washington Supreme Court has held remand was necessary where the revocation was “based, at least in part,” on legal error. Dahl, 139 Wn.2d at 402. Similarly, a sentence modification is invalid and should be reversed to the extent the trial court relies on erroneous reasons. State v. Abd-Rahmaan, 154 Wn.2d 280,

290-91, 111 P.3d 1157 (2005). In the context of exceptional sentence review, remand is appropriate unless the State can show the sentencing court did not place considerable weight on any invalid factor. State v. Gaines, 122 Wn.2d 502, 512, 859 P.2d 36 (1993) (“[R]emand for resentencing is necessary where it is not clear whether the trial court would have imposed an exceptional sentence on the basis of only one factor upheld.”); State v. Bourgeois, 72 Wn. App. 650, 664, 866 P.2d 43 (1994) (reversing where trial court placed “significant weight” on invalid factors).

The principles espoused in these cases support remand. The trial court found that Deyarmin had committed new offenses, but it did so by believing that these offenses may have represented some escalation in Deyarmin’s mental health issues. 2RP 24. The trial court also blamed Deyarmin for not addressing mental health issues even though, as discussed above, Deyarmin was never required to undergo treatment for mental health issues. And, at the State’s request, the trial court appeared to accept the State’s arguments that Deyarmin’s reports of sexual fantasies were “concerning” and perhaps an “escalation” in behavior, despite the fact that the State never notified Deyarmin it sought revocation for failure to adequately progress in treatment. Deyarmin’s new criminal charges were inextricably wrapped up in the trial court’s discussion of unaddressed mental health issues.

The loss of a SSOSA is a “significant consequence” and imposes the greatest punishment the court can impose at that juncture. State v. Sims, 171 Wn.2d 436, 443, 256 P.3d 285 (2011). The record shows that the trial court did not find it would revoke Deyarmin’s sentence solely based on violating the SSOSA by committing new crimes. Because the State cannot demonstrate that the trial court would still revoke the SSOSA on that basis alone, this court should reverse the revocation order and remand for a new hearing.

4. ILLEGAL COMMUNITY CUSTODY CONDITIONS
MUST BE STRICKEN FROM THE JUDGMENT AND
SENTENCE

Deyarmin’s original judgment and sentence includes illegal community custody conditions, which should be stricken. Illegal or erroneous sentences may be challenged for the first time on appeal. Bahl, 164 Wn.2d at 744. And the revocation of a suspended sentence is simply “an extension of the original criminal conviction.” McCormick, 166 Wn.2d at 699. It is therefore proper to challenge the illegal conditions now.

- a. The trial court exceeded its statutory authority in prohibiting Deyarmin from using or possessing controlled substances without a written prescription from a licensed physician

Under RCW 9.94A.703(2)(c), the trial court may order an offender to “[r]efrain from possessing or consuming controlled substances except pursuant to “lawfully issued prescriptions” as a condition of community custody. There trial court ordered Deyarmin to “not consume or possess any

controlled substance, unless prescribed by [a] licensed practicing physician.”
CP 47.

Prescriptions can be lawfully issued by many more individuals than just physicians, such as registered nurses, physician assistants, advanced registered nurse practitioners, optometrists, and dentists. RCW 69.41.030. In drafting RCW 9.94A.703(2)(c), the legislature was obviously aware it had authorized many different medical, dental, and other health practitioners to write valid prescriptions. See Wynn v. Earin, 163 Wn.2d 361, 371, 181 P.3d 806 (2008) (“The legislature is presumed to know the law in the area in which it is legislating.”). The legislature chose to authorize possession of the much broader “lawfully issued prescriptions.” By limiting Deyarmin to consuming or possessing prescriptions only from licensed physicians, the trial court overrode this legislative decision. The condition therefore exceeds the trial court’s statutory authority. It must be stricken.

- b. The community custody condition prohibition possession of “any pornography, in any form” is unconstitutional

Under the due process clauses of the Fourteenth Amendment and article I, section 3, the State must provide citizens fair warning of prohibited conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). This due process vagueness doctrine also protects against arbitrary, ad hoc, or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857

P.2d 270 (1993). A prohibition is unconstitutionally vague if it does not (1) define the prohibition with sufficient definiteness such that ordinary people can understand what conduct is prohibited or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53. There is no presumption in favor of the constitutionality of a community custody condition. State v. Sanchez Valencia, 169 Wn.2d 782, 792-93, 239 P.3d 1059 (2010). Imposition of an unconstitutionally vague condition is manifestly unreasonable, requiring reversal. Id. at 791-92.

The prohibition on Deyarmin’s possession of “any pornography, in any form” is unconstitutionally vague. CP 48. In Bahl, the sentencing condition prohibited Bahl from “possess[ing] or access[ing] pornographic materials, as directed by the supervising Community Corrections Officer.” 164 Wn.2d at 754. As the Bahl court discussed at length, the word “pornography” is entirely subjective, and a prohibition on possessing or perusing pornography is unconstitutionally vague. Id. at 754-58. Because definitions of pornography can and do differ widely—they may “include any nude depiction, whether a picture from *Playboy Magazine* or a photograph of Michelangelo’s sculpture of David,” id. at 756—the prohibition on possessing pornography is not sufficiently definite to apprise ordinary persons of what is permitted and what is proscribed. Because the condition is unconstitutionally

vague, it must be stricken from Deyarmin's judgment and sentence. Id. at 758, 761-62.

Recently, in an attempt to insulate a pornography prohibition from a vagueness challenge, the sentencing court defined pornography as "images of sexual intercourse, simulated or real, masturbation, or the display of intimate body parts." State v. Padilla, 190 Wn.2d 672, 676, 416 P.3d 712 (2018). But even that effort fell short, as the supreme court deemed the definition also unconstitutionally vague. Id. at 677-85. Under Bahl and Padilla, the prohibition on "any pornography, in any form" must be stricken from Deyarmin's judgment and sentence.

5. THE SHERIFF'S FEE, CRIMINAL FILING FEE, AND DOMESTIC VIOLENCE ASSESSMENT SHOULD BE STRICKEN FROM THE JUDGMENT AND SENTENCE

For similar reasons he challenges certain community custody conditions now following revocation of Deyarmin's SSOSA, Deyarmin also challenges the imposition of discretionary LFOs in his judgment and sentence. Under State v. Ramirez, 191 Wn.2d 732, 739-40, 426 P.3d 714 (2018), the trial court must engage in an adequate, individualized inquiry into an indigent defendant's ability to pay discretionary LFOs. The adequacy of this inquiry is reviewed de novo. Id. at 740-42.

The trial court here did not make an adequate inquiry under RCW 10.01.160, even recognizing that it did not have the benefit of Ramirez or of

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), at the 2013 sentencing. The trial court asked two questions, whether Deyarmin had worked and whether he was physically able to work. 1RP 18. This inquiry fails under Ramirez to satisfy the requirements of RCW 10.01.160(3). 191 Wn.2d at 743-44 (requiring inquiry into other debt, income, assets and other financial resources, monthly living expenses, GR 34 considerations, as well as employment history). To satisfy RCW 10.01.160(3)'s "mandate that the State cannot collect costs from defendants who are unable to pay, the record must reflect that the trial court inquired into all five of these categories before deciding to impose discretionary costs." Ramirez, 191 Wn.2d at 744.

The trial court imposed a sheriff's filing fee, domestic violence assessment, and the criminal filing fee. CP 37. The sheriff's filing fee is a discretionary cost under RCW 10.01.160(3). The domestic violence penalty assessment is also discretionary. RCW 10.99.080(1) (stating that superior courts "may impose a penalty of one hundred dollars, plus an additional fifteen dollars on any person convicted of a crime involving domestic violence" (emphasis added)). Under recently legislative amendments, neither the criminal filing fee nor discretionary costs under RCW 10.01.160(3) may be lawfully be imposed against indigent defendants. RCW 36.18.020(h) (recently amended by LAWS OF 2018, ch. 269, § 17(2)(h)); RCW 10.01.160 (recently amended by LAWS OF 2018, ch. 269, § 6(3)). Deyarmin was indigent

at the time of sentencing, qualifying for the appointment of counsel at the outset of this case based on indigency. CP 76-77 (orders providing court-appointed counsel based on Deyarmin's financial circumstances). He remains indigent today, despite continuing to work while on his SSOSA. CP 71-75. Because the trial court's inquiry was inadequate to ensure Deyarmin had the ability to pay discretionary (or otherwise defunct) LFOs, Deyarmin is at minimum entitled "to a resentencing hearing on his ability to pay LFOs." Ramirez, 181 Wn.2d at 746. If the State does not agree to strike the filing fee, sheriff's fee, and domestic violence assessment, then this court should remand this matter where the legally required adequate inquiry into Deyarmin's ability to pay these LFOs may occur.

D. CONCLUSION

The trial court's revocation of Deyarmin's SSOSA was reversible error. Alternatively, the challenged community custody conditions must be stricken from Deyarmin's judgment and sentence.

DATED this 18th day of March, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read 'Kevin A. March', written over a horizontal line.

KEVIN A. MARCH
WSBA No. 45397
Office ID No. 91051

Attorneys for Appellant

NIELSEN, BROMAN & KOCH P.L.L.C.

March 18, 2019 - 1:57 PM

Transmittal Information

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Appellate Court Case Title: State of Washington v. Nathan D. Deyarmin
Superior Court Case Number: 12-1-00043-5

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