

No. 81193-8
COA No. 58255-1-1

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID McCORMICK,

Petitioner.

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DIVISION ONE
JAN 17 2008

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

The Honorable Thomas J. Wynne, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner David McCormick, the appellant below, asks this Court to review the following Court of Appeals decision.

B. COURT OF APPEALS DECISION

McCormick seeks review of Division One's partially published decision in State v. McCormick, 141 Wn. App. 256, 169 P.3d 508 (October 22, 2007), attached as appendix A. By order dated December 18, 2007, the Court of Appeals denied McCormick's motion to reconsider. Appendix B.

C. ISSUES PRESENTED FOR REVIEW

At the time of the trial court hearing, petitioner David McCormick was a 61-year-old indigent disabled man in a wheelchair who picked up food from the Saint Vincent DePaul food bank in Everett. The record showed McCormick had obtained food from this location for years, with no problem. In 2006, the community corrections officer (CCO) nonetheless believed this violated suspended sentence conditions directing McCormick to "not frequent areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer." CP 46-47.

The trial court found McCormick violated the condition but said it could not find the violation was willful. RP 15-16. The court

revoked the suspended sentence and ordered McCormick to serve a 123-month prison term. CP 9-13.

1. Do the due process clauses of the state and federal constitutions require the state to prove a willful violation of community custody conditions before revoking a suspended sentence and imposing 123 months in prison?

2. Was the evidence insufficient to support the trial court's findings supporting revocation of the suspended sentence? CP 9.

D. STATEMENT OF THE CASE¹

On July 31, 2000, the trial court found McCormick guilty and sentenced him to a Special Sexual Offender Sentencing Alternative (SSOSA). The conditions of the SSOSA required McCormick to participate in and make progress in sexual deviancy treatment, and "not frequent areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer." CP 46-47.

In 2006, McCormick was disabled, in a wheelchair, and living on a fixed disability income in Everett. RP 6, 13; CP 22. For years he traveled to the food bank at Saint Vincent DePaul/Immaculate

¹ The Court of Appeals decision summarizes the facts accurately. Brief of Appellant, at 4-10; 141 Wn. App. at 258-59.

Conception to obtain free food. RP 3, 6-7. Because of his disability, he traveled to the food bank closest to his house. RP 13. It was his understanding that his prior CCO had approved this location. RP 6-7, 13.

In March of 2006, the CCO moved to revoke the SSOSA, alleging the Saint Vincent DePaul food bank was located on the property of the Immaculate Conception Grade School.² The violation report did not explain the physical layout of the food bank's location in relation to the school, however. It simply asserted "[a]s churches and schools are viewed as places where minors are known to congregate, this is a violation of supervision." CP 16.

In his response to the CCO, McCormick denied knowing the food bank was on school property and denied seeing any minors present when he went to the food bank. CP 16.

At the violation hearing held May 16, 2006, the parties argued the disputed question as to the food bank's location in relation to the school. As defense counsel stated, it was not clear that the food bank was affiliated with the school. Entrance to the food bank was in an alley. RP 3. "The food bank is separate from the school and does

² The CCO's report was dated March 21, 2006, and filed May 16, 2006. The header has an incorrect date, May 23, 2005. CP 15-18.

not appear to be located in a school. A road and a large building block the playground from the sight of the food bank." CP 22. Defense counsel stated, "the playground is almost two blocks away. . . the place where the children congregate, it is really as far away from the food bank as it could be in terms of where it is located next to the school." RP 12.

The CCO asserted the high school was across the street from the food bank. RP 11-12. The food bank was located in the basement of the former convent. RP 8. The state did not prove there are any signs at the food bank that would identify it as affiliated with a school or other place where a minor is known to congregate. Some classes apparently were held in the upper floors of the former convent, but the state did not establish that anyone entering the food bank from the alley would know that portions of the former convent were used as a school or an area where minors are known to congregate.

Defense counsel's affidavit further provided that the food bank was open on Friday morning at 9:00 – 10:20. People line up about 15 minutes early. CP 21. In contrast, parents dropped off children at the school's playground at 7:50. CP 21.

Given this record, it is not surprising the trial court did not find McCormick willfully violated the SSOSA condition. The court instead admitted it did not know whether McCormick was unwilling or unable to follow the SSOSA conditions. RP 15-16. The court nonetheless revoked the suspended sentence and ordered McCormick to serve 123 months in prison. RP 15-16; CP 9-13.

The Court of Appeals affirmed the trial court and denied McCormick's motion for reconsideration. State v. McCormick, 141 Wn. App. 256, 169 P.3d 508 (2007). This petition timely follows.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THIS COURT SHOULD DECIDE WHETHER THE STATE MUST PROVE A WILLFUL VIOLATION OF A SSOSA CONDITION BEFORE A TRIAL COURT MAY REVOKE THE SUSPENDED SENTENCE.

The SSOSA statute in effect when McCormick's offense was committed allowed a court to revoke a SSOSA only if an offender (a) violates the conditions of the suspended sentence, or (b) fails to make satisfactory progress in a treatment program. Former RCW 9.94A.120(8)(a)(vi) (1999).³ Otherwise, revocation constitutes an

³ Former RCW 9.94A.120(8)(a)(vi) (1999) provides:

The court may revoke the suspended sentence at any time during the period of community custody and order execution of the sentence if: (a) The defendant violates

abuse of discretion. State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999).

In Dahl, this Court discussed due process protections in the context of SSOSA revocations. Setting the due process floor beneath which the state may not go, the Dahl court stated

minimal due process entails: (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. Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). These requirements exist to ensure that the finding of a violation of a term of a suspended sentence will be based upon verified facts. Id. at 484, 92 S.Ct. 2593.

Dahl, 139 Wn.2d at 683.

Dahl raised notice and confrontation issues in his challenge to the revocation. Dahl, at 684-85 (notice); at 686-87 (confrontation).

This Court agreed the trial court erred in failing to permit Dahl to

the conditions of the suspended sentence, or (b) the court finds that the defendant is failing to make satisfactory progress in treatment. All confinement time served during the period of community custody shall be credited to the offender if the suspended sentence is revoked.

This section was recodified in 2001 as RCW 9.94A.670(10), without substantial amendment.

confront the witnesses against him. Because the error undermined the reliability of the trial court's finding, it was not harmless. This Court accordingly reversed and remanded for a new revocation hearing. Dahl, at 686-87.

The Dahl Court did not address whether the state must prove a willful violation of sentence conditions before revoking a suspended sentence. Its concern for reliable determinations of facts before revocation of suspended sentences nonetheless supports McCormick's request for review.

McCormick argued, inter alia, the constitution required the trial court to find the alleged violation was willful. Brief of Appellant (BOA) at 21-25; U.S. Const. amend. 14; Const. art. 1, § 3. McCormick relied on authority from other states holding that basic principles of fairness require the state to prove a willful violation before revoking parole or a suspended sentence. See e.g., Messer v. State, 145 P.3d 457, 460 (Wyo. 2006); Van Wagner v. State, 677 So.2d 314, 316-17 (Fla. App. 1996); People v. Zaring, 8 Cal. App. 4th 362, 10 Cal.Rptr.2d 263 (1992); State v. Williamson, 61 N.C.App. 531, 301 S.E.2d 423, 425 (1983); see also, Kupec v. State, 835 P.2d 359, 362 (Wyo. 1992) ("Revoking the probation of a defendant whose failure to comply with his probation conditions was not willful but instead resulted from

factors beyond his control would be fundamentally unfair"); accord, State v. Hodges, 798 P.2d 270 (Utah App. 1990).

McCormick also cited settled due process principles discussed in Bearden v. Georgia, 461 U.S. 660, 672-73, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983) and Smith v. Whatcom County District Court, 147 Wn.2d 98, 52 P.3d 485 (2002). Both cases recognized the due process violation that occurs when a state revokes a suspended sentence based on an offender's inability to pay financial obligations. The state must establish a willful failure to pay before imposing sanctions. Bearden, 461 U.S. at 672-73; Smith, 147 Wn.2d at 111-14.

At oral argument and in his motion for reconsideration, McCormick further emphasized the SSOSA condition itself required the state to establish a knowing violation:

Do not frequent areas where minor children are known to congregate, as defined by the community corrections officer.

CP 46 (emphasis added). The state's claim would require a court to rewrite the condition:

"Do not frequent the vicinity of, or be in proximity to, or across the street from, or near areas where minor children ~~are known to congregate~~, as defined by the Community Corrections Officer."

See Brief of Respondent, at 9 (arguing McCormick was in the "vicinity"), at 14 ("proximity"), at 18 ("proximity," "across the street"), at 24 ("vicinity" and "near"), at 29 ("vicinity").

The Court of Appeals did not cite or discuss the out-of-state case law. The court distinguished the willfulness requirement of Bearden and Smith by limiting those cases to questions of financial ability to pay. 141 Wn. App. at 262. The Court of Appeals simply relied on its decision in State v. Gropper, 76 Wn. App. 882, 885-86, 888 P.2d 1211 (1995), holding "no finding of willfulness was required." 141 Wn. App. at 263.

McCormick asks this Court to review this holding for three reasons.

First, the due process question is one of first impression in Washington. The Gropper court did not address due process, but instead decided that case on statutory grounds. Gropper, 76 Wn. App. at 885-87 (citing former RCW 9.94A.200(2)(c)).

To date, Washington case law appears to have required the state to prove a willful violation only when the state seeks to modify or revoke a sentence based on an offender's failure to pay financial obligations. In that circumstance, courts may punish an offender's willful recalcitrance, but not a legitimate inability to pay due to poverty.

Smith, 147 Wn.2d at 111-14; State v. Woodward, 116 Wn. App. 697, 706, 67 P.3d 530 (2003); State v. Peterson, 69 Wn. App. 143, 147, 847 P.2d 538 (1993); see generally, Bearden v. Georgia, 461 U.S. at 672-73 (probation cannot be revoked for financial violations without a finding of willful noncompliance); Gagnon v. Scarpelli, 411 U.S. 778, 790, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) (same).

But this Court has not had the opportunity to determine whether it makes sense to allow the state to revoke a suspended sentence when the offender does not willfully violate nonfinancial sentence conditions. The case law from other states recognizes it is fundamentally unfair to impose 123 months in prison for a violation the trial court could not find was willful.

Second, the case presents the willfulness question on simple facts uncomplicated by harmless error analysis. The trial court admitted it could not find McCormick's violation was willful. RP 15-16. This Court therefore can issue a decision stating and applying a clear rule.

Third, the Court of Appeals opinion overlooks the SSOSA condition as printed. Its plain language required the state to establish McCormick frequented an area "where minor children are known to congregate[.]" By including this knowledge element, the condition

necessarily required the state to prove McCormick knowingly violated the condition. Washington law generally equates proof of knowledge with proof of willfulness. RCW 9A.08.010(4). The Court of Appeals' contrary holding improperly rewrote the condition.

This case therefore presents a significant constitutional question and a question of substantial public interest. This Court should accept review. RAP 13.4(b)(3), (4).

2. THE EVIDENCE WAS INSUFFICIENT TO PROVE THE VIOLATION.

The unpublished part of the decision also erred in rejecting McCormick's claim the evidence was insufficient to prove the violation. The Court of Appeals disagreed, reasoning in various places that the food bank was "associated with" or "across the street from" a church and a school. Slip op. at 7, 9.

The problem with this reasoning, as discussed at oral argument and in the motion to reconsider, is the condition did not prohibit McCormick from picking up food at a food bank. It prevented him from frequenting areas where minors are known to congregate. Nothing in the record showed the food bank was signed or marked as "affiliated" with a church or school, or that children congregate at the

food bank, or that the CCO told McCormick not to go to the food bank.

A person who has gone to a Saint Vincent DePaul thrift store may have visited a place "affiliated" with a church, but he certainly has not gone to church – at least as "church" is customarily defined. Likewise, a person such as McCormick, who has picked up food at a food bank, has not "frequented" a church or a school. McCormick went to a food bank, where he picked up food from adult staff. There is a difference between places where minors are "known to congregate" and places where minors might conceivably exist at some point. Because the condition prohibited the former and the state at most proved the latter, the trial court erred in revoking the SSOSA. BOA at 14-19.

McCormick's brief also established the reasons why there was insufficient evidence to support the trial court's determination that he had unsuccessfully completed treatment. BOA at 19-21. He incorporates that argument here.

The Court of Appeals therefore affirmed the trial court's ruling despite insufficient evidence. This Court should grant review. RAP 13.4(b)(3).

F. CONCLUSION

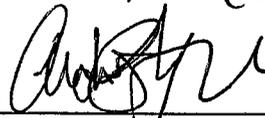
For the reasons set forth above, this Court should grant review.

RAP 13.4(b), 13.6.

DATED this 17 day of January, 2008.

Respectfully submitted,

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Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record of ~~Spokane County~~ ~~prosecutor~~ containing a copy of the document to which this declaration is attached.
Spokane Co. prosecutor TT

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Bry Cox 1-17-08
Name Done in Seattle, WA Date

Appendix A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON.

STATE OF WASHINGTON)	
)	DIVISION ONE
Respondent,)	
)	No. 58255-1-I
v.)	
)	OPINION PUBLISHED IN PART
DAVID ELVIN McCORMICK,)	
)	FILED: October 22, 2007
Appellant.)	
_____)	

BAKER, J. — David McCormick appeals the trial court's order revoking his special sexual offender sentencing alternative (SSOSA).¹ The court found McCormick had violated the conditions of his suspended sentence for first degree rape of a child by frequenting a place where minors are known to congregate, and by failing to complete a sexual deviancy treatment program. We affirm.

I.

David McCormick was convicted of first degree rape of a child under the age of 12. At age 55, McCormick had no previous criminal history. The court suspended his sentence of 123 months, and sentenced him to a SSOSA. In doing so, the court imposed a number of conditions, including requirements that he not frequent areas

¹ RCW 9.94A.670.

where minor children are known to congregate, and that he participate and make progress in sexual deviancy treatment.

After three years of therapy, the court relieved McCormick from continuing treatment.

One year later, the court was notified that McCormick had initiated conversation with two female minors. His Community Corrections Officer (CCO) also reported that McCormick's niece, who lived in California, had revealed that McCormick had sexually molested her and her sister on numerous occasions approximately 30 years before. McCormick signed a stipulated agreement acknowledging he had contact with minor children, and agreed to re-enroll in sexual deviancy treatment.

McCormick was back in court the following year. This time the court found he had violated the conditions of his SSOSA by visiting the Everett Baptist Church, the Twin Lakes Park, and Everett High School, all areas where children are known to congregate. McCormick was sentenced to 120 days in jail, and ordered once again into treatment.

In March 2006, McCormick's CCO received information from one of McCormick's housemates that McCormick had been visiting a food bank located in the Immaculate Conception Elementary School, and had on numerous occasions made vulgar sexual comments about young girls. As churches and schools are considered places where children are known to congregate, the CCO determined that McCormick was in violation of the terms of his supervision. The CCO informed McCormick's therapist that McCormick would be taken into custody for violating the conditions of his SSOSA.

The therapist then terminated McCormick's participation in the sexual deviancy program he had been attending. In a letter summarizing the termination, the therapist noted two previous similar incidences to which McCormick had responded with denial and blame. He also noted that McCormick always claimed to be avoiding high-risk situations. The therapist concluded that keeping McCormick in sex offender treatment was no longer clinically justified.

At a court hearing, the State offered a written statement by McCormick's housemate, David Bralley, but did not call Bralley himself as a witness. In the statement, Bralley asserted that McCormick had visited the food bank regularly, and made numerous sexual comments about children.

McCormick's CCO testified that she had provided him with a list of places he was barred from visiting, including schools, churches, and day care centers. The CCO also testified that the high school McCormick had been sanctioned for visiting was located across the street from the food bank.

The court found McCormick had once again frequented a place where minors are known to congregate, and failed to complete a sexual deviancy treatment program. It revoked McCormick's SSOSA and sentenced him to 123 months in prison.

McCormick now appeals.

II.

The SSOSA statute provides that a sentencing court may suspend the sentence of a first time sexual offender if the offender is shown to be amenable to treatment.² An offender's SSOSA may be revoked at any time if a court is reasonably satisfied that an

² RCW 9.94A.670. McCormick was sentenced pursuant to former RCW 9.94A.120 (2001), subsequently recodified as RCW 9.94A.505.

offender has violated a condition of his suspended sentence or failed to make satisfactory progress in treatment.³ Once a SSOSA is revoked, the original sentence is reinstated.⁴ Revocation of a suspended sentence rests within the discretion of the court.⁵ A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds.⁶

The revocation of a suspended sentence is not a criminal proceeding.⁷ Accordingly, the due process rights afforded at a revocation hearing are not the same as those afforded at the time of trial.⁸ An offender facing revocation of a suspended sentence has only the minimal due process rights afforded one facing revocation of probation or parole.⁹

Minimal due process at a revocation proceeding entails: (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.¹⁰ These requirements exist to ensure that the finding of a violation of a condition of a suspended sentence will be based upon verified facts.¹¹

³ RCW 9.94A.670(10).

⁴ State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999).

⁵ State v. Badger, 64 Wn. App. 904, 908, 827 P.2d 318 (1992).

⁶ State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

⁷ Dahl, 139 Wn.2d at 683.

⁸ Dahl, 139 Wn.2d at 683.

⁹ Dahl, 139 Wn.2d at 683.

¹⁰ Dahl, 139 Wn.2d at 683.

¹¹ Dahl, 139 Wn.2d at 683.

A revocation hearing should not be equated to a full-blown criminal prosecution, because society has already been put to the burden of proving beyond a reasonable doubt that the defendant was guilty of the crime for which the sentence was imposed.¹²

Willfulness

McCormick argues that the court was required to find that his violations were willful before it could revoke his suspended sentence. He asserts that the court's failure to make a finding of willfulness equates to strict liability, and that revocation without a finding of willfulness violates due process.

In support of his argument he cites a number of cases addressing willfulness in relation to conviction. State v. Sisemore¹³ deals with jury instructions regarding a no-contact order violation. Likewise, Lambert v. People of the State of California¹⁴ (distinguishing wholly passive conduct from willful behavior), State v. Anderson,¹⁵ and State v. Warfield¹⁶ (both firearm possession cases) deal with findings of willfulness required for conviction. But because the due process rights afforded at a revocation hearing are not the same as those afforded at the time of trial, the cited cases are not relevant to McCormick's argument.

He also relies on Bearden v. Georgia¹⁷ and Smith v. Whatcom County District Court.¹⁸ In those cases, the offender's probation was revoked due to failure to pay financial obligations. The Supreme Court recognized the fundamental unfairness in

¹² State v. Canfield, 154 Wn.2d 698, 706, 116 P.3d 391 (2005) (quoting State v. Johnson, 9 Wn. App. 766, 772, 514 P.2d 1073 (1973)).

¹³ 114 Wn. App. 75, 55 P.3d 1178 (2002).

¹⁴ 355 U.S. 225, 78 S. Ct. 240, 2 L. Ed. 2d 228 (1957).

¹⁵ 141 Wn.2d 357, 5 P.3d 1247 (2000).

¹⁶ 119 Wn. App. 871, 80 P.3d 625 (2003).

¹⁷ 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983).

¹⁸ 147 Wn.2d 98, 52 P.3d 485 (2002).

punishing a probationer by revoking his probation when he has made all reasonable efforts to pay a fine but was not able to do so through no fault of his own.¹⁹ The Court held that willfulness was not a requirement in all situations.²⁰

Reflecting that moral imperative, RCW 9.94A.634 (covering noncompliance with condition or requirement of sentence) specifies willfulness as an element of noncompliance only with regard to legal financial obligations and restitution.²¹

Under the Sentencing Reform Act of 1981²² (SRA), the trial court may revoke a SSOSA suspended sentence whenever the defendant violates the conditions of the suspended sentence, or the court finds that the defendant is failing to make satisfactory progress in treatment.²³ RCW 9.94A.670(10) does not require that a violation be willful. Proof of violations need not be established beyond a reasonable doubt, but must reasonably satisfy the court that the breach of condition occurred.²⁴

This court addressed the issue of willfulness in State v. Gropper.²⁵

RCW 9.94A.200(2)(c)²⁶ does not require a court to consider willfulness before ordering incarceration for a violation of a condition that does not involve a financial obligation. By its terms, that section of the statute applies to orders “regarding payment of legal financial obligations and . . . community service obligations.” Nothing in the statute suggests that section (2)(c) should be applied to any other type of violation.^[27]

We follow the clear precedent of the Gropper decision and hold that no finding of willfulness was required.

¹⁹ Bearden, 461 U.S. at 668-69.

²⁰ Bearden, 461 U.S. at 669 n. 9.

²¹ RCW 9.94A. 634(3)(d).

²² Ch. 9.94A RCW.

²³ RCW 9.94A.670(10).

²⁴ Badger, 64 Wn. App. at 908.

²⁵ 76 Wn. App. 882, 888 P.2d 1211 (1995).

²⁶ Recodified as RCW 9.94A.634.

²⁷ Gropper, 76 Wn. App. at 885-86.

The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with the rules governing unpublished opinions.

Sufficiency of Evidence

The State bears the burden of showing an offender's noncompliance with a condition of his suspended sentence by a preponderance of the evidence.²⁸ McCormick argues that his mere presence at the food bank is insufficient to meet the State's burden. He argues that because he arrived at the food bank after the children arrived at school, and because the food bank was separated from the main school building, the playground, and drop-off area, he could not be found in violation unless the State demonstrated that minors were known to congregate while he was there.

McCormick had been told specifically not to go to churches or schools. The food bank was located in a facility associated with both a church and a school. The conditions of his SSOSA did not limit McCormick's presence to those times when children were actually present. He was barred from churches and schools altogether. The court could be reasonably satisfied that McCormick, by visiting the food bank, had violated a condition of his suspended sentence.

Likewise, the court could be satisfied that McCormick had failed to make progress in his treatment. McCormick had already been sent back into offender treatment once before after he was found in violation of the conditions of his suspended sentence. After the CCO contacted McCormick's therapist, McCormick was dropped from the treatment program. While the therapist's termination summary was offered in response to the CCO's report that McCormick had been visiting the food bank, it also

²⁸ RCW 9.94A.634(3)(c).

cited two similar prior incidents. The counselor noted that McCormick had claimed to be avoiding high-risk situations, and that his response to those prior incidents appeared dishonest and manipulative. The counselor concluded that continued offender treatment was no longer clinically justified.

We hold that the evidence was sufficient to find that McCormick had violated a condition of his suspended sentence, and failed to make satisfactory progress in treatment.

Vagueness

The due process vagueness doctrine has a twofold purpose: (1) to provide adequate notice of what conduct is proscribed, and (2) to offer protection from arbitrary ad hoc enforcement.²⁹ Probation conditions are subject to a vagueness challenge, and the challenger has the burden of overcoming the presumption of constitutionality.³⁰

The constitution does not require “impossible standards of specificity” or “mathematical certainty” because some degree of vagueness is inherent in the use of our language.³¹ Thus, a vagueness challenge cannot succeed merely because a person cannot predict with certainty the exact point at which conduct would be prohibited.³²

In State v. Riles,³³ our supreme court rejected the argument that no contact conditions and conditions ordering an offender to not frequent places where minors

²⁹ State v. Riles, 135 Wn.2d 326, 348, 957 P.2d 655 (1998).

³⁰ Riles, 135 Wn.2d at 348.

³¹ Riles, 135 Wn.2d at 348.

³² Riles, 135 Wn.2d at 348.

³³ 135 Wn.2d 326, 348, 957 P.2d 655 (1998).

congregate are unconstitutionally vague.³⁴ Courts have authority to order offenders not to have direct or indirect contact with a specified class of individuals.³⁵

McCormick argues that the condition that he avoid areas where minors congregate is impermissibly vague as applied to his conduct. Essentially, he argues that because he was not told to avoid food banks, he could not have known that he risked having his SSOSA suspended by visiting the food bank located at the Immaculate Conception School.

As discussed above, McCormick had been barred from frequenting places where children are known to congregate, and was told specifically not to go to churches or schools. While he may not have been told to avoid food banks, the food bank he visited was located in a facility associated with both a church and a school. Furthermore, the food bank was located across the street from a high school which McCormick had visited before, a visit which resulted in his confinement. The requirement that McCormick avoid schools and churches was clear. The fact that the food bank was in the basement of a school does not create any vagueness about the terms of his suspended sentence as applied to his behavior.

The condition that McCormick not frequent places where children congregate is not unconstitutionally vague.

Hearsay Evidence

At a sentence modification hearing, an offender has the right to confront adverse witnesses unless good cause exists not to allow the confrontation.³⁶ A court may

³⁴ Riles, 135 Wn.2d at 347-48.

³⁵ Riles, 135 Wn.2d at 348-49.

³⁶ State v. Abd-Rahmaan, 154 Wn.2d 280, 288, 111 P.3d 1157 (2005).

nevertheless consider alternatives to live testimony in these settings, including affidavits and other documentary evidence which would otherwise be considered hearsay.³⁷ However, hearsay evidence should be considered only if there is good cause to forgo live testimony.³⁸ Good cause is defined in terms of “difficulty and expense of procuring witnesses in combination with ‘demonstrably reliable’ or ‘clearly reliable’ evidence.”³⁹

At the revocation hearing, the State offered a written statement by McCormick’s housemate, David Bralley, but did not call Bralley himself as a witness. McCormick did not object to the State’s introduction of the statement as hearsay. Instead, McCormick’s counsel noted that Bralley was absent from court, and asked that the court find Bralley was not a credible witness.

McCormick’s counsel also introduced hearsay evidence of her own from workers at the food bank.

A defendant’s failure to object to a violation of due process and his own use of hearsay during argument constitutes a waiver of any right of confrontation and cross-examination.⁴⁰

Ineffective Assistance of Counsel

McCormick argues in the alternative that trial counsel provided ineffective assistance in failing to object to the introduction of Bralley’s statement as unreliable hearsay.

³⁷ Abd-Rahmaan, 154 Wn.2d at 288-89.

³⁸ Dahl, 139 Wn.2d at 686.

³⁹ Dahl, 139 Wn.2d at 686 (quoting State v. Nelson, 103 Wn.2d 760, 765, 697 P.2d 579 (1985)).

⁴⁰ Dahl, 139 Wn.2d at 687 n.2.

In order to establish that counsel was ineffective, a defendant must show that counsel's conduct was deficient and that the deficient performance resulted in prejudice.⁴¹ To show deficient representation, a defendant must show that it fell below an objective standard of reasonableness based on all the circumstances.⁴² The defendant must overcome a strong presumption that counsel's performance was not deficient.⁴³ Prejudice is established if the defendant shows that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different.⁴⁴

Deficient performance is not shown by matters involving trial strategy or tactics.⁴⁵ As noted above, counsel pointed out that Bralley was not present in court, but did not object to the introduction of his statement. Rather, she asked that the court find Bralley not credible. It is entirely possible counsel chose not to object to the State's hearsay evidence in order to introduce hearsay evidence of her own. Counsel may also have felt it easier to impugn Bralley's credibility in his absence than with him present in court. McCormick has not presented evidence of ineffective assistance sufficient to rebut our strong presumption of competence, or shown that counsel's performance fell below an objective standard of reasonableness.

Nor has McCormick demonstrated that the outcome of the hearing would have been different, but for counsel's failure to object. It is undisputed that McCormick was present at the food bank; and that the food bank is located in the Immaculate

⁴¹ State v. Brockob, 159 Wn.2d 311, 345, 150 P.3d 59 (2006) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

⁴² Brockob, 159 Wn.2d at 345.

⁴³ Brockob, 159 Wn.2d at 345.

⁴⁴ State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

⁴⁵ Hendrickson, 129 Wn.2d at 77-78.

Conception Elementary School, albeit in the basement. Much of Bralley's statement was corroborated by defense counsel's affidavit and testimony by the CCO. The distinguishing feature of his statement largely concerned the time when McCormick typically arrived at the food bank, and his alleged comments regarding young girls.

In its written order, the court noted that it considered defense counsel's affidavit, and the testimony of the CCO. It did not list Bralley's statement among the materials it considered in reaching its decision. The court found that McCormick had clearly violated the terms of his suspended sentence by being on the school premises in the first place, regardless of when children might be coming and going. The court noted that it would never have granted McCormick approval to visit the food bank, given that it was located in a school. It then referenced McCormick's previous appearances before the court, and stated, "Given where we have been with this case, I think I have no alternative but to revoke the SSOSA."

There is no reasonable probability that the outcome of the proceeding would have been different had McCormick's attorney moved to suppress Bralley's statement. Ineffective assistance of counsel has not been shown.

AFFIRMED.

Balley, J.

WE CONCUR:

Demp, J.

Cox, J.

Appendix B

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON)

Respondent,)

v.)

DAVID ELVIN McCORMICK,)

Appellant.)
_____)

DIVISION ONE

No. 58255-1-I

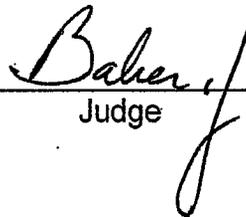
ORDER DENYING MOTION
FOR RECONSIDERATION

The appellant, David Elvin McCormick, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 18th day of December, 2007.

FOR THE COURT:



Judge

FILED
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STATE OF WASHINGTON
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