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No. 36715-7-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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City of Aberdeen,  
Appellant

vs.

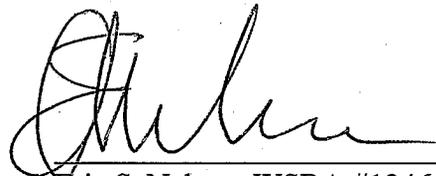
Francis James Regan,  
Respondent

FILED  
COURT OF APPEALS  
DIVISION II  
08 APR 22 PM 12:15  
STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY

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BREIF OF APPELLANT

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## **I. INTRODUCTION**

The City of Aberdeen petitioned for discretionary review of a decision issued by the Superior on appeal from the Aberdeen Municipal Court. The Court of Appeals accepted review on February 1, 2008.

## **II. ASSIGNMENTS OF ERROR**

The Superior Court erred in issuing its decision of August 22, 2007, holding that revocation of probation for failure to comply with a condition requiring “no criminal violations of law” requires proof beyond a reasonable doubt that a criminal violation has occurred and that such proof cannot be shown if a jury has acquitted the defendant on the violation alleged in the probation revocation proceeding.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**Issue Number 1.** Did the Superior Court error as matter of law in holding that a condition of probation requiring the defendant to have “no criminal violations of law” must be proven beyond a reasonable doubt?

## **IV. STATEMENT OF THE CASE**

The Respondent was convicted of Assault in the Fourth Degree and placed on probation for two years. One of the conditions of the suspended sentence was “no criminal violations of law.” CP 62.

The Respondent was subsequently charged with the new offenses of Criminal Trespass and Assault in the Fourth Degree. The Petitioner moved in open court to revoke Respondent’s probation based on a

criminal violation of law. The revocation hearing was set over and consolidated with the new criminal trial. The sentencing judge presided over the jury trial on the new charges. CP 25, 35.

The Respondent was acquitted on both new charges by the jury. The sentencing judge subsequently held a probation revocation hearing and found, by a preponderance of the evidence, relying on the evidence presented at trial, that the Respondent had violated the conditions of his probation. CP 36. Five days in jail was imposed as a sanction. CP 39.

Respondent appealed to Superior Court arguing that “criminal violations” should be interpreted as “criminal convictions” and the prosecution must prove a subsequent criminal conviction. CP 41-48. The Superior Court found the condition “no criminal violations of law” ambiguous. The Court reasoned that using the word “criminal” to describe “violation” meant that the probation violation must be proved beyond a reasonable doubt. In this case, since a jury had acquitted the defendant under that standard of proof, the Superior Court held that the sentencing judge was prohibited from revoking probation for a “criminal violation”. CP 55-56.

## **V. ARGUMENT.**

**Issue Number 1. The Superior Court erred as a matter of law by holding a probation violation must be proved beyond a reasonable doubt.**

It is well-established law that revocation of probation is within the discretion of the sentencing court. It is only necessary that the evidence be sufficient to reasonably satisfy the court that the defendant violated a condition or committed a new crime. *See, e.g., Standlee v. Smith*, 83

Wn.2d 405, 408-409 (1974); *State v. Khun*, 81 Wn.2d 648, 650 (1972); 13B Washington Practice §4204, at 453.

It is also well-established law that the dismissal or acquittal of a crime does not bar revocation of probation based on the same criminal violation, if the sentencing court nonetheless believes that the defendant committed that crime. *See, e.g., State v. Barry*, 25 Wn.App. 751, 761-62 (1980); *Stae v. Cyganowski*, 21 Wn.App. 119, 121 (1978); *State v. Fry*, 15 Wn.App. 499, 550 P.2d 697, *review denied*, 87 Wn.2d 1008 (1976); 13B Washington Practice §4204, at 453.

The standard of review to be applied to factual determinations made by the sentencing court in probation revocations is “abuse of discretion” and “de novo” for errors of law. *See, e.g., State v. Ortega*, 120 Wn.App. 165, 171, 84 P.3d 935 (2004); *State v. Garza*, 150 Wn.2d 360, 366, 77 P.2d 347 (2003).

In its decision below, the Superior Court acknowledged that acquittal did not prevent revocation of probation based on the same criminal conduct. But the court then attempted to avoid controlling appellate authority by holding that the Aberdeen Municipal Court’s use of the term “no criminal violations of law” in its standard conditions of probation meant a violation of the condition had to be proved beyond reasonable doubt. The court then concluded that the defendant’s acquittal by a jury meant the proper revocation standard (proof beyond a reasonable doubt) could not be met in the probation revocation proceeding. Although the Superior Court did not use the terms “due process” or “collateral estoppel” in its decision, and the defendant’s brief on appeal did not cite authority for either, the Superior Court’s reasoning implied either or both as the basis of its decision.

In effect, the Superior Court held that the sentencing court violated the defendant's due process rights by determining that his violation of the "no criminal law violations" condition required only proof by a preponderance of the evidence. The Superior Court then, in effect, concluded that the sentencing court was collaterally estopped from applying the correct burden of proof because the defendant had been acquitted by a jury.

A similar argument was rejected by an eight justice majority in *Standlee v. Smith, supra*. In *Standlee* the court held that applying a lower burden of proof in parole revocation hearings did not violate due process and was not barred by collateral estoppel. Justice Utter dissented because he believed the proper burden of proof for an alleged criminal violation should be beyond a reasonable doubt and that "the parole board would be collaterally estopped to reach a different result from the superior court trial which applied that test." *Id.*, at 410. The Superior Court in this case has inadvertently followed Justice Utter's lone dissent in *Standlee*.

The Superior Court's decision is also internally inconsistent. The Superior Court reasoned that the defendant's probation could have been revoked, regardless of his acquittal, if the condition violated had been "obey all laws" or "law abiding behavior". Since both terms clearly include criminal violations of law it is impossible to understand why the more limited condition, "no criminal violations of law", may only be proved by a new criminal conviction.

The "no criminal violations of law" condition imposed by the Aberdeen Municipal Court is not vague or ambiguous. It is the same term used in the standard Judgment and Sentence for Misdemeanors and Gross Misdemeanors prepared by the Pattern Forms Committee and the

Administrative Office of the Courts for the state of Washington which may be downloaded from <http://www.courts.wa.gov/forms>.

The term is also routinely used in contexts where administrative, law enforcement, and judicial officers are determining that criminal violations have occurred based on probable cause or a preponderance of the evidence. See, e.g., *Bosteder v. City of Renton*, 155 Wn.2d 18, 22 (2005)(search warrants); *In re Disciplinary Proceeding Against Kuvara*, 149 Wn.2d 237(2003)(disciplinary actions); *State v. Duncan*, 146 Wn.2d 166(2002)(“Terry Stops”); *McKenna v. Edwards*, 65 Wn.App. 905 (1992)(pre-trial release); *Coffel v. Clallam County*, 58 Wn.App. 517 (1990)(“failure to enforce” tort liability).

The “no criminal violations of law” condition is simply intended to be less restrictive than “obey all laws” which would include jaywalking and parking tickets. The grammatical structure of the phrase is likely based on the common usage of terms. Failure to obey a statute that imposes a criminal sanction is commonly referred to as a criminal violation of law, as opposed to a failure to obey a criminal law. For example, would “obey all criminal laws” add clarity or would it create more confusion?

One thing is certain: both the sentencing court that imposed the condition and the defendant clearly understood the difference between a “criminal violation” and a new “criminal conviction”. If the sentencing court had meant “conviction” it would have said “conviction” and not “violation.”

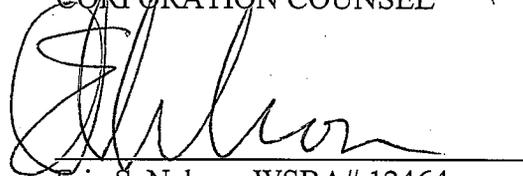
The Superior Court created a problem where none existed by refusing to recognize a difference between “violation” with “conviction.”

**VI. CONCLUSION**

This court should reverse the Superior Court and affirm the Municipal Court's determination by a preponderance of the evidence that the Respondent violated the terms of his probation by engaging in conduct that would constitute a criminal violation of law.

Respectfully submitted April 21, 2008.

CORPORATION COUNSEL

A handwritten signature in black ink, appearing to read "Eric S. Nelson", written over a horizontal line.

Eric S. Nelson, WSBA# 12464  
Attorney for Appellant

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

BY \_\_\_\_\_  
DEPUTY

CITY OF ABERDEEN,  
Appellant,

vs.

FRANCIS JAMES REGAN,  
Respondent.

Cause No. 36715-7-II

DECLARATION OF SERVICE

PURSUANT TO RCW 9A.72.085, Linda Ybarra declares as follows:

On April 21, 2008, I served true and correct copies of the following documents upon Eric J. Nielsen, of Nielsen Broman & Kock PLLC, attorney of record for respondent Francis James Regan, at 1908 E. Madison St., Seattle, WA 98122-2842, by depositing the same in the U. S. Post Office, first class postage prepaid, on April 21, 2008:

1. Brief of Appellant (copy enclosed).

I declare under penalty of perjury that the foregoing is true and correct.

DATED: April 21, 2008, in Aberdeen, Washington.

  
\_\_\_\_\_  
KELLY TOOMEY

DECLARATION OF SERVICE

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