

82476-2

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON

2008 NOV 21 PM 4:46

SUPREME COURT NO. \_\_\_\_\_  
COURT OF APPEALS NO. 36715-7-11

FILED  
DEC - 4 2008

CLERK OF SUPREME COURT  
STATE OF WASHINGTON

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FRANCIS REGAN,

Petitioner.

FILED  
COURT OF APPEALS  
DIVISION II

08 NOV 25 PM 11:16  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable Mark McCauley, Judge

PETITION FOR REVIEW

ERIC J. NIELSEN  
Attorney for Petitioner

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

**TABLE OF CONTENTS**

	Page
A. <u>IDENTITY OF PETITIONER</u> .....	1
B. <u>COURT OF APPEALS DECISION</u> .....	1
C. <u>ISSUE PRESENTED FOR REVIEW</u> .....	1
D. <u>STATEMENT OF THE CASE</u> .....	1
E. <u>REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENTS</u> .....	2
THIS COURT SHOULD ACCEPT REVIEW BECAUSE THE ISSUE IS OF SUBSTANTIAL PUBLIC INTEREST AND INVOLVES SIGNIFICANT QUESTIONS UNDER THE STATE AND FEDERAL CONSTITUTIONS. ....	2
F. <u>CONCLUSION</u> .....	9

**TABLE OF AUTHORITIES**

Page

**WASHINGTON CASES**

Jury v. Dep't of Licensing,  
114 Wn. App. 726, 60 P.3d 615 (2002),  
*review denied*, 149 Wn.2d 1034,  
75 P.3d 968 (2003) . . . . . 7

Pattison v. Dep't of Licensing,  
112 Wn. App. 670, 50 P.3d 295 (2002) . . . . . 6, 7

Standlee v. Smith,  
83 Wn.2d 405, 518 P.2d 721 (1974) . . . . . 2, 4, 5

State v. Regan,  
\_\_\_ Wn. App. \_\_\_, \_\_\_ P. 3d. \_\_\_  
(Court of Appeals No. 36715-7-II,  
filed November 18, 2006) . . . . . 1

State v. Carter,  
138 Wn. App. 350, 157 P.3d 420 (2008) . . . . . 7

State v. Coria,  
146 Wn.2d 631, 48 P.3d 980 (2002) . . . . . 8

State v. Cyganowski,  
21 Wn. App. 119, 584 P.2d 425 (1978) . . . . . 3, 4, 6

State v. Kier,  
\_\_\_ Wn.2d \_\_\_, 2008 Wash. LEXIS 1030 (filed 10/9/08) . . . . . 8

State v. Kuhn,  
81 Wn.2d 648, 503 P.2d 1061 (1972) . . . . . 3, 4

State v. Quintero Morelos,  
133 Wn. App. 591, 137 P.3d 114 (2006) . . . . . 8

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

In re Winship,  
397 U.S. 358, 90 S. Ct. 1068,  
25 L. Ed. 2d 368 (1970) . . . . . 5

RULES, STATUTES AND OTHERS

Black's Law Dictionary (7th Ed. 1999) . . . . . 4

RAP 13.4(b)(3) . . . . . 9

RAP 13.4(b)(4) . . . . . 9

RCW 46.20.308(2) . . . . . 6

RCW 46.61.502 . . . . . 6

RCW 46.61.503 . . . . . 6

RCW 46.61.504 . . . . . 6

A. IDENTITY OF PETITIONER

Petitioner, Francis Regan, the appellant below, asks this Court to review the Court of Appeals decisions referred to in Section B.

B. COURT OF APPEALS DECISION

Regan requests review of the Court of Appeals published decision in State v. Regan, \_\_\_ Wn. App. \_\_\_, \_\_\_P. 3d. \_\_\_, (Court of Appeals No. 36715-7-II, filed November 18, 2006). Appendix A.

C. ISSUE PRESENTED FOR REVIEW

Where petitioner was acquitted of the alleged criminal violations did the court erroneously find he violated the condition of his probation that he commit "no criminal violations of law" where that finding was based on the same allegations?

D. STATEMENT OF THE CASE

A condition of Regan's misdemeanor probation is the requirement of "no criminal law violations." While on probation, Regan was charged with fourth degree assault and criminal trespass. A jury acquitted him of those offenses. Later however, the trial judge ruled Regan violated the "no criminal violations of law" condition of probation based on a finding he committed the criminal trespass despite the jury's acquittal. Regan appealed to the Superior Court and that court reversed the trial court, holding the

"no criminal violations of law" condition required the City to prove a violation of a criminal statute beyond a reasonable doubt and the jury's acquittal foreclosed finding a violation of "no criminal violations of law" condition of Regan's probation.

The City appealed the Superior Court's ruling. The Court of Appeals reversed the Superior Court. The Court of Appeals, relying on this Court's decision in Standlee v. Smith, 83 Wn.2d 405, 409, 518 P.2d 721 (1974), held regardless of the probation condition, the burden of proof in a probation revocation proceeding is whether the evidence and facts reasonably satisfy the court that the probationer has breached a condition under which he was granted probation. Appendix at 4.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENTS

THIS COURT SHOULD ACCEPT REVIEW BECAUSE THE ISSUE IS OF SUBSTANTIAL PUBLIC INTEREST AND INVOLVES SIGNIFICANT QUESTIONS UNDER THE STATE AND FEDERAL CONSTITUTIONS.

Generally, as the Court of Appeals correctly points out, the reasonable doubt standard applicable to criminal trials does not apply to probation revocation hearings. The standard applied to probation revocations is the proof must "reasonably satisfy" the court that the breach of the condition of probation occurred. Standlee v. Smith, 83 Wn.2d at

409; State v. Kuhn, 81 Wn.2d 648, 650, 503 P.2d 1061 (1972). The issue here is whether the "condition" of probation that Regan commit "no criminal violations of law" was breached where a jury acquitted him of the criminal law violation the court later found was a breach of the condition of probation.

Where probation is revoked even though the probationer was acquitted of a subsequent criminal offense the issue is whether the probationer breached the condition of probation. In State v. Cyganowski, 21 Wn. App. 119, 584 P.2d 425 (1978), for example, the issue was whether the court abused its discretion when it conducted the probation revocation before the criminal trial on the same allegations. Cyganowski entered a plea of guilty to grand larceny and was subsequently placed on probation. A condition of probation was that he "refrain from engaging in any assaultive behavior." Id. at 120. Cyganowski was later accused of swinging an axe at a person. A revocation hearing was held and the court found Cyganowski had engaged in assaultive behavior. After the hearing, Cyganowski was tried for the incident and was acquitted.

The Cyganowski court held the trial court did not abuse its discretion when it held the probation revocation before the trial because, given the terms of the probation condition, "a showing of assaultive behavior was

needed to prove a violation of probation, and not a conviction of assault." State v. Cyganowski, 21 Wn. App. at 121. The Cyganowski court additionally reasoned that "if the hearing had been delayed until after the trial, an acquittal would not have prevented a revocation of probation due to the differing standards of proof." Id. (citing, Standlee v. Smith, 83 Wn.2d 405, and State v. Kuhn, 81 Wn.2d 648).

The issue in Cyganowski was whether Cyganowski "engaged in assaultive behavior" despite an acquittal on the criminal charge of assault. Thus, a court could find that while Cyganowski did not commit a criminal assault he nonetheless "engaged in assaultive behavior" in violation of that specific condition of his probation.

Here, however, the specific condition of probation was commit "no criminal law violations." Criminal means "[h]aving the character of a criminal offense; in the nature of a crime." Black's Law Dictionary 380 (7th Ed. 1999). Violation means "[a]n infraction or breach of the law; a transgression" or the "act of breaking or dishonoring the law." Id. at 1564. Under its plain language, to show a breach of the condition that Regan commit "no criminal violations of law" the City was required to show Regan committed a criminal offense. And, to prove a "criminal violation" the constitution requires the City to prove each element of the crime beyond

a reasonable doubt. In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Thus, the Superior Court judge was correct when he held "that the chosen condition of 'no criminal law violations' requires that the burden of proof be beyond a reasonable doubt." CP 55-56 (emphasis added).

This Court's decision in Standlee does not lend support to the Court of Appeals reasoning. Standlee was a parole violation case. Standlee's parole was revoked based on an allegations Standlee committed kidnapping, assault, rape and molestation. At a nonjury trial Standlee was acquitted based on an alibi defense. Standlee v. Smith, 83 Wn.2d at 722. After his trial, the hearing officer concluded Standlee committed the assault, despite the acquittal, and revoked his parole. Id.

The issue in Standlee was whether under the doctrine of collateral estoppel Standlee's acquittal prohibited the hearing officer from revoking his parole. Standlee v. Smith, 83 Wn.2d at 722. The Court held that because the standard of proof for finding a parole or probation violation was whether the hearing officer was reasonably satisfied a violation occurred, as opposed to the reasonable doubt standard of proof in a criminal prosecution, collateral estoppel did not apply. Id. at 723. This Court affirmed the revocation decision reasoning, "[h]ere the alibi witness created

a reasonable doubt in the trial judge's mind and he necessarily acquitted petitioner. On the other hand, with a lesser standard of proof, the hearing officer believed the victims, discounted the alibi witness who had created a reasonable doubt in the judge's evaluation and importantly felt the petitioner was a threat to society if at large." *Id.* (emphasis added).

The Sandlee decision does not identify the specific term or condition of parole Sandlee was alleged to have violated. It cannot be assumed with any confidence the term or condition of parole prohibited Sandlee from "no criminal law violations" (the condition in this case) or some other term or condition, like in Cyganowski, where an acquittal of the criminal offense did not foreclose a finding a probation violation.

The reasoning in Pattison v. Dep't of Licensing, 112 Wn. App. 670, 673, 50 P.3d 295 (2002) is instructive. Pattison argued the State Patrol implied consent warning, required under RCW 46.20.308(2), was misleading. The warning read in part: "You are further advised that your license, permit, or privilege to drive will be suspended, revoked, or denied if the test is administered and the test indicates the alcohol concentration of your breath is 0.08 or more, if you are age 21 or over, or 0.02 or more if you are under age 21; or if you are in violation of RCW 46.61.502, 46.61.503 or 46.61.504." *Id.* at 676. Pattison argued that under the law,

a driver only loses his or her license if the driver is convicted of violating one of the three mentioned statutes but the "in violation" language in the warning misled driver's into believing that losing one's license is an inevitable consequence of merely being arrested. *Id.* The Pattison court rejected that argument and held. "[t]he more reasonable understanding of the warning, in context, is that the phrase 'if you are in violation of' means 'if you are prosecuted and convicted for.'" *Id.* See, Jury v. Dep't of Licensing, 114 Wn. App. 726, 731, 60 P.3d 615 (2002), *review denied*, 149 Wn.2d 1034, 75 P.3d 968 (2003) (same).

Here, like the warning in Pattison, the reasonable understanding, in context, is that the "no criminal law violations" condition means prosecuted and convicted of a crime beyond a reasonable doubt. A jury found the City failed to prove beyond a reasonable doubt that Regan committed the trespass. The Superior Court judge was correct in finding that based on that acquittal, as a matter of law, Regan did not violate the "no criminal law violations" condition of his probation.

Moreover, whether the "no criminal law violations" condition means prosecuted and convicted of a crime or merely the judge's belief a crime was committed, is ambiguous. In criminal law jurisprudence ambiguities are interpreted against the government under the rule of lenity. See State

v. Carter, 138 Wn. App. 350, 356-57, 157 P.3d 420 (2008) (ambiguous statutes requires resolution of that ambiguity in the defendant's favor); State v. Kier, \_\_\_ Wn.2d \_\_\_, 2008 Wash. LEXIS 1030 at 17-21 (filed 10/9/08) (ambiguous verdict must be resolved in the defendant's favor); State v. Quintero Morelos, 133 Wn. App. 591, 137 P.3d 114 (2006) (rule of lenity applies to ambiguous court rules). The rule of lenity is based in large part on basic notions of due process. Statutes and rules should give fair notice of prohibited acts, as well as the punishment to be imposed. State v. Coria, 146 Wn.2d 631, 651-56, 48 P.3d 980 (2002) (Sanders, J., dissenting) (discussing at length the connection between constitutional due process requirements and the rule of lenity).

The principle of fair notice dictates the rule of lenity should apply to probation conditions as well. A probationer should be entitled to know with some certainty the meaning of conditions of probation and what act or behavior constitutes a breach of the conditions. Because the "no criminal law violations" condition is at best ambiguous with regard to whether the condition is breached only by a conviction, the rule should apply and Regan's acquittal should foreclose revocation of his probation.

The "no criminal law violations" is not an uncommon condition of probation. This case is the first to squarely address whether that condition

is breached if a probationer is acquitted of the crime. Thus, the issue is of substantial public importance and this Court should accept review to provide practitioners and the lower courts guidance. RAP 13.4(b)(4). Moreover, because the reasonable understanding of the term "no criminal law violations" means convicted of a crime, the issue implicates the constitutional requirement that criminal offenses be proved beyond a reasonable doubt. RAP 13.4(b)(3).

F. CONCLUSION

For the above reasons, this Court should accept review.

DATED this 20 day of November, 2008.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

  
ERIC J. NIELSEN  
WSBA No. 12773  
Office ID No. 91051

Attorneys for Appellant

FILED  
COURT OF APPEALS  
DIVISION II

08 NOV 18 AM 8:46

RECEIVED

NOV 19 2008

STATE OF WASHINGTON

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

Nielsen, Broman & Koch, P.L.L.C.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

CITY OF ABERDEEN,

Petitioner,

v.

FRANCIS JAMES REGAN,

Respondent.

No. 36715-7-II

PUBLISHED OPINION

HOUGHTON, P.J. -- The superior court reversed and remanded a municipal court finding that Francis Regan violated a condition of his probation. The City of Aberdeen appeals, arguing that the superior court erred because it applied the wrong burden of proof. The City contends that revoking probation based on a violation of a “no criminal violations of the law” condition does not require a finding of proof beyond a reasonable doubt but instead requires evidence sufficient to reasonably satisfy the municipal court that Regan violated a probationary condition. Clerk’s Papers (CP) at 55. We agree and reverse and remand.

**FACTS**

On January 13, 2005, the Aberdeen Municipal Court found Regan guilty of fourth degree assault, sentenced him to 365 days of jail with 360 days suspended, and placed him on probation for 24 months. As one of the conditions of his probation, Regan agreed to commit “no criminal violations of the law.” CP at 55.

On April 28, 2006, the City charged Regan with fourth degree assault and criminal trespass. As a result of these new charges, the City petitioned the municipal court for a probation revocation hearing, which the court continued until after trial. At trial, a jury acquitted him of both criminal trespass and fourth degree assault.

At the probation revocation hearing, the municipal court revoked five days of Regan's suspended sentence. The judge, who had also presided at the criminal trial, ruled that although the jury found Regan not guilty using a beyond a reasonable doubt standard, the evidence supported "at least a criminal trespass violation." CP at 36. Regan appealed to the superior court.

The superior court agreed with the City "that an acquittal in a criminal proceeding does not preclude revocation of a suspended sentence." CP at 55. But the superior court reversed the municipal court, reasoning that Regan's probation conditions prohibited "criminal violations of the law" and, therefore, any violation must be proved beyond a reasonable doubt. CP at 55.

We granted the City's motion for discretionary review.

#### ANALYSIS

The City contends that revocation of probation based on a violation of a "no criminal violations of the law" condition does not require a finding of proof beyond a reasonable doubt.<sup>1</sup> Instead, it argues that it--revocation of probation--requires evidence sufficient to reasonably satisfy a court that the defendant violated a condition of probation. The City asserts that the

---

<sup>1</sup> We note that the phrase "no criminal violations of the law" might be ambiguous, but the rule of lenity does not apply in the probation conditions context. Rather, the trial court has broad discretion in determining the conditions and whether the probationer has violated them. RCW 3.50.340; RCW 3.66.069; RCW 9.95.230. See *State v. Kuhn*, 81 Wn.2d 648, 650, 503 P.2d 1061 (1972).

municipal court punished Regan, not for his 2006 assault and trespass charges for which the jury acquitted him but for violating the conditions of his probation imposed after his 2005 assault conviction.

Courts allow probation not as a right, but as a rehabilitative measure “granted to the deserving and withheld from the undeserving’ within the sound discretion of the trial judge.” *State v. Kuhn*, 81 Wn.2d 648, 650, 503 P.2d 1061 (1972) (quoting *State v. Farmer*, 39 Wn.2d 675, 679, 237 P.2d 734 (1951)). On review, we apply a de novo standard, sitting in the same position as the trial court with respect to this question of law. *State v. Womac*, 160 Wn.2d 643, 649, 160 P.3d 40 (2007).

Both parties rely on *Standlee v. Smith*, a habeas corpus case where the court reaffirmed the validity of the trial court’s parole revocation even after the defendant’s acquittal of underlying felony charges. 83 Wn.2d 405, 406-07, 518 P.2d 721 (1974). As the *Standlee* court explained, even when probation revocation hearings and criminal trials are premised on the same alleged violation, the two carry distinct burdens of proof, thereby precluding application of collateral estoppel and res judicata.<sup>2</sup> 83 Wn.2d at 408-09. The Supreme Court has firmly established that the standard of proof in a criminal trial is “beyond a reasonable doubt.” *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Likewise, as the *Standlee* court recognized that the burden of proof in probation revocation proceedings is whether “the

---

<sup>2</sup> A year after our Supreme Court decided *Standlee*, a federal district court attempted to explicitly overrule it, *Standlee v. Rhay*, 403 F. Supp. 1247 (E.D. Wash. 1975). The Ninth Circuit overturned the District Court’s decision, explaining that as “[t]he Supreme Court of Washington has determined that parole revocation is a remedial sanction[,] [t]his court should defer to that finding.” *Standlee v. Rhay*, 557 F.2d 1303, 1307 (9th Cir. 1977) (citation omitted).

evidence and facts be such as to reasonably satisfy the court that the probationer has breached a condition under which he was granted probation.” 83 Wn.2d at 409.

Here, the superior court determined that the probationary condition of “no criminal violations of the law” requires proof beyond a reasonable doubt because the condition contains the word “criminal.” CP at 55. But *Standlee* dictates the opposite conclusion.<sup>3</sup> 83 Wn.2d at 408-09; see also *State v. Johnson*, 92 Wn.2d 598, 600 n.2, 599 P.2d 529 (1979) (acknowledging that under *Standlee* “collateral estoppel does not bar a parole board from finding the accused guilty of violations after the accused has been acquitted on the same charges in a criminal trial”); *State v. Barry*, 25 Wn. App. 751, 761, 611 P.2d 1262 (1980). As the *Barry* court noted, “Whether the probation proceeding or the criminal trial comes first makes no difference, because the judge may revoke probation if he is reasonably satisfied of the defendant’s misconduct, be it criminal or a breach of the conditions of probation.” 25 Wn. App. at 762. The municipal court determined that it was reasonably satisfied with the evidence establishing Regan’s violation of his probation conditions and, thus, the evidence met the burden of proof announced in *Standlee*.

Our Supreme Court has spoken on this issue: Probation revocation hearings for criminal offenses are not subject to proof beyond a reasonable doubt standard. *Standlee*, 83 Wn.2d at

---

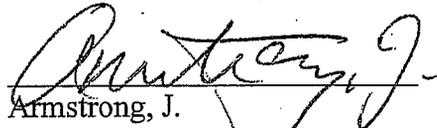
<sup>3</sup> At argument, both parties agreed that neither the City nor Regan had presented *Standlee* to the trial court.

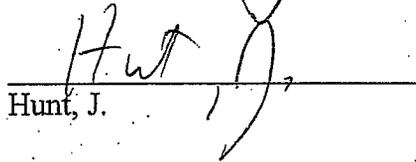
No. 36715-7-II

408-09. Instead, such hearings require evidence sufficient to reasonably satisfy the court that the defendant violated a condition of probation. For these reasons, we reverse and remand.

  
\_\_\_\_\_  
Houghton, P.J.

We concur:

  
\_\_\_\_\_  
Armstrong, J.

  
\_\_\_\_\_  
Hunt, J.

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

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2008 NOV 21 PM 4:46

CITY OF ABERDEEN, )

Appellant, )

vs. )

FRANCIS REGAN, )

Respondent. )

COA NO. 36715-7-II

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 21<sup>ST</sup> DAY OF NOVEMBER 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ERIC S. NELSON  
ATTORNEY AT LAW  
200 EAST MARKET STREET  
ABERDEEN, WA 98520

[X] FRANCIS REGAN  
419 QUEEN AVENUE  
# A3  
HOQUIAM, WA 98550

FILED  
COURT OF APPEALS  
DIVISION II  
08 NOV 25 AM 11:17  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

**SIGNED** IN SEATTLE WASHINGTON, THIS 21<sup>ST</sup> DAY OF NOVEMBER 2008.

x. Patrick Mayovsky