

62738-4

62738-4

No. 62738-4-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

v.

B.R., Appellant.

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COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON
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BRIEF OF RESPONDENT

**DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney
By KYLE MOORE
Appellate Deputy Prosecutor
Attorney for Respondent
WSBA #34181**

**Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 676-6784**

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS OF ERROR

1. WHETHER THE STATE MET MINIMAL DUE PROCESS STANDARDS OF NOTICE WHEN IT SUPPLIED B.R. WITH A MOTION TO REVOKE THE SSODA DISPOSITION, WHICH STATED THE ALLEGATION AGAINST B.R., AND ATTACHED POLICE REPORTS SUPPORTING THE STATE’S CLAIM.
2. WHETHER THE STATE IS REQUIRED TO SHOW THAT A VIOLATION OF A SUSPENDED SENTENCE IS “WILLFUL” UNDER RCW 13.40.160(3)(b)(ix), WHEN PREVIOUS CASE LAW HELD THAT A FINDING OF “WILLFUL” WAS NOT NECESSARY.

C. FACTS

1. Procedural facts

B.R., herein the appellant, pled guilty to one count of child molestation in the first degree on June 11, 2008 . C.P. 134-138¹. Disposition was continued to August 27, 2008 in order to investigate B.R.'s suitability to enter into a Special Sex Offender Disposition Alternative [hereinafter SSODA]. *Id.* at 134-138, C.P. 126-133. On August 27, 2008, the Juvenile Court accepted B.R.'s request to enter into the SSODA program, and as a result, was ordered, inter alia, to comply with all conditions of the treatment contract and program. CP 126-133. B.R. was subject to 24 months of community supervision as part of the SSODA. *Id.* at 126-133.

B.R. entered into a treatment contract with Rick Ackerman, a certified sexual offender treatment provider, on September 2, 2008. IRP 23-24. Rick Ackerman went over the contract with B.R. and explained to him the rules and requirements of the program. *Id.* at 24. B.R. was told that he couldn't be any place unsupervised unless by agreement with his treatment provider and probation, and that he was not allowed to be with anyone more than twenty-four months younger than him. *Id.* at 24. B.R.

was also told that he could not be at any public place where children congregate. *Id.* at 24.

On September 6, 2008, an officer with the Everson Police Department observed B.R. and another individual sitting at a picnic table in the Nooksack Park. 1RP 8. Also present in the park were several other families with approximately five small children under the age of ten. *Id.* at 9. The officer spoke with B.R., who admitted that he was not supposed to be in the park. *Id.* at 8-9. The officer spoke with one of the fathers of the children, who said that they were present in the park before B.R. and his friend had arrived. *Id.* at 9.

On September 8, 2008, the State brought a motion to revoke B.R.'s SSODA program based upon the incident from September 6, 2008. CP 115-125. The motion listed the incident from September 6, 2008 as the basis for revocation from the SSODA program. CP 116. Attached to the motion was a police narrative from Officer Matthew Munden from September 6, 2008 explaining the incident. *Id.* at 115-125.

The State also became aware of another incident which occurred before Billy Robinson entered into the SSODA disposition. CP 115-125.

¹ “CP” refers to the Clerk’s Papers.

The allegation was that the defendant contacted a 14 year old girl and had made inappropriate comments to her, which included, “have you ever had sex?” *Id.* at 115-125. This incident occurred on August 12, 2008, and was reported to law enforcement on August 29, 2008, two days after B.R. had entered into the SSODA program. *Id.* at 115-125. The State offered the report for the August 12, 2008 incident as context to give the court a complete picture of B.R.’s commitment to the SSODA program. 1RP 2.

On October 1, 2008, the Juvenile Court held a revocation hearing in which Officer Matthew Munden and Rick Ackerman testified. 1RP 1-43. Rick Ackerman testified that he had several concerns about B.R. being on the SSODA program prior to B.R.’s acceptance into the program. 1RP 25-30. Rick Ackerman was initially concerned about an incident in which B.R. was alleged to have made racial comments to African-American children by the Nooksack River in Everson, WA. 1RP 25-26. B.R. denied the incident. 1RP 26. Rick Ackerman requested that B.R. undergo a polygraph test prior to acceptance into the SSODA program; B.R. failed two polygraph tests, and Rick Ackerman asked him to undergo a third test. 1RP 26, 31. Rick Ackerman testified that if he passed the third polygraph test, he would be supportive of B.R. entering into the SSODA program. 1RP 26. B.R. passed a third polygraph examination, but only after

changing the questions and answers to the test. 1RP 26. Rick Ackerman testified that he was concerned that B.R. was not being entirely honest throughout the evaluation process. 1RP 26, 31. When asked about the September 6, 2008 incident, Rick Ackerman testified that he was concerned about B.R. remaining in the community, especially since B.R. did not comply with the treatment contract only four days after signing it. 1RP 37-38. Rick Ackerman also testified that had he known about the August 12, 2008 incident, he would not have recommended B.R. to be on the SSODA program. 1RP 35.

The commissioner ordered that B.R. be revoked from the SSODA program at the conclusion of the October 1, 2008 hearing. CP 112-114. The findings entered by the court indicate that “the juvenile has violated the terms and conditions of the SSODA as follows: Respondent violated the terms of treatment by being in an area with children under the age of 10,” and, “The juvenile is not amenable to the SSODA program according to the treatment provider.” CP 113. On October 22, 2008, the commissioner sentenced B.R. to serve a determinate sentence of 36 weeks at the Juvenile Rehabilitation Administration [hereinafter JRA]. CP 80-87.

B.R. made a motion to revise the commissioner’s decision on October 9, 2008. CP 10-79, 88-91. The revision hearing took place on

November 20, 2008, and Rick Ackerman was called to the stand to testify whether the September 6, 2008 event, without considering the August 12, 2008 event, was cause to revoke B.R. from the SSODA. 3RP 5-7. Rick Ackerman testified that due to the September 6, 2008 event, in which B.R. was found in the park with children were present, he recommended B.R. be revoked from the SSODA. 3RP 5-7.

The trial judge ruled that B.R. had violated the terms of his disposition, and took particular notice of the treatment provider's opinion that the SSODA should be revoked. CP 8-9. The trial judge denied B.R.'s request to overturn the commissioner's ruling from October 1, 2008. CP 8-9.

D. ARGUMENT

1. THE STATE MET MINIMAL DUE PROCESS STANDARDS OF NOTICE WHEN IT SUPPLIED B.R. WITH A MOTION TO REVOKE THE SSODA DISPOSITION, WHICH STATED THE ALLEGATION AGAINST B.R., AND ATTACHED POLICE REPORTS SUPPORTING THE STATE'S CLAIM

Appellant B.R. asserts that he did not have sufficient notice of the allegations against him in order to prepare a defense to those allegations. B.R. points to the fact that the notice of violation alleges that he was present at Nooksack City Park where persons two or more years younger were also present, but that the trial judge ruled that B.R. had violated the

terms of his SSODA by being in an area where children were likely to congregate. CP 115-125, CP 8. However, both conditions were simultaneously violated when B.R. went into the park, and B.R. received notice of his violation when supplied with the police reports that were attached to the State's motion to revoke the SSODA disposition. CP 115-125.

The court discussed what due process rights were applicable to a suspended sentence revocation hearing in State v. Dahl, 139 Wn.2d 678, 990 P.2d 396 (1999). The court notes that the revocation of a suspended sentence is not a criminal proceeding, and thus, "due process rights afforded at a revocation hearing are not the same as those afforded at the time of trial." Dahl, 139 Wn.2d 678 at 683, *see also* Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)(proposition that revocation of parole is not part of a criminal prosecution, and thus the full panoply of rights due to a defendant in such proceeding does not apply to parole violations). "An offender facing revocation of a suspended sentence has only minimal due process rights." Dahl, 139 Wn.2d 678 at 683, *citing* State v. Nelson, 103 Wn.2d 760, 763, 697 P.2d 579 (1985). Sexual offenders facing revocation of their SSOSA disposition are entitled to the same minimal due process rights as those rights afforded at a parole

revocation hearing. Dahl, 139 Wn.2d 678 at 683, *citing* State v. Badger, 64 Wn.App. 904, 907, 827 P.2d 318 (1992).

The United States Supreme Court in Morrissey set out the framework for what minimal due process entails. Morrissey, 408 U.S. 471 at 489. The list includes, (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) an opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a ‘neutral and detached’ hearing body; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. Morrissey, 408 U.S. 471 at 489, *see* Dahl, 139 Wn.2d 678 at 683.

To meet the standard of minimal due process, “proper notice must set forth all alleged parole violations so that a defendant had the opportunity to marshal the facts in his defense.” Dahl, 139 Wn.2d 678 at 684. In Dahl, the State had informed the defendant that he had failed to make reasonable progress in treatment, and provided the defendant a copy of the treatment provider’s reports. Dahl, 139 Wn.2d 678 at 684. Several instances of conduct were listed in the reports, but were not listed by the

State as independent violations. Dahl, 139 Wn.2d 678 at 684. The court ruled that “Dahl was informed of the State’s contention that he failed to make reasonable progress in his treatment program. He was also supplied with copies of the treatment provider reports, upon which the State relied upon to prove Dahl’s SSOSA violation.” Dahl, 139 Wn.2d 678 at 685. “Given that the State notified Dahl both of his alleged SSOSA violation and of the facts supporting the State’s claim, we hold that notice provided to Dahl met minimal due process standards.” Dahl, 139 Wn.2d 678 at 685.

In this case, the State provided B.R. with a motion to revoke his SSODA disposition, stating that he was “present at Nooksack City Park where persons two years or younger were also present. [B.R.] did not have a supervisor with him when he decided to enter and stay in the park.” CP 115-125. B.R. was also given the attached police reports which specifically told him of the evidence that would be relied upon by the State at his revocation hearing. CP 115-125. B.R. had all of the facts necessary to argue his case at the hearing. B.R. had to be aware that his violation in the park simultaneously violated several portions of his treatment contract; namely, to congregate in an area where children may be, and to be around children who are two or more years younger than the defendant. The State

contends that minimal due process standards were met with the notice of revocation and police reports supplied to the defendant.

B.R. did not object to lack of proper notice at his hearing, and thus is barred from claiming a due process violation on appeal. In State v. Robinson, the court held that “a person accused of violating the conditions of sentence has some responsibility in ensuring that his or her rights under Morrissey are protected. The accused must, at a minimum, place the court on notice that due process is being violated by making an appropriate objection.” State v. Robinson, 120 Wn.App. 294, 299, 85 P.3d 376 (2004).

B.R. is asking the court to revisit its decision in Robinson and find that a challenge to the notice at a revocation hearing is of such constitutional magnitude that it can be raised for the first time on appeal. However, according to Morrissey, the State only needs to meet minimal due process standards when seeking to revoke a probationer’s parole. Morrissey, 408 U.S. 471 at 480-84. “The State has found the parolee guilty of a crime against the people. That finding justifies imposing extensive restrictions on the individual’s liberty.” Morrissey, 408 U.S. 471 at 483. The State has an overwhelming interest in being able to return an individual to imprisonment without the burden of a new adversary criminal trial if he fails to abide by the conditions of his parole. Morrissey,

408 U.S. 471 at 483. There is a significant difference between an individual who is not convicted of a criminal offense and one who has been convicted of a crime. An individual who has not been convicted has a right to a trial by jury, and all due process rights necessarily attach. In this case, B.R. has been found guilty of the offense, and can only be expected to receive minimal due process requirements, relieving the State from expecting to have a formal process tantamount to criminal trial.

Finally, the court should only reverse itself on an established rule of law if the rule is shown to be incorrect or harmful. State v. Ray, 130 Wn.2d 673, 678, 926 P.2d 904 (1996), *citing* State v. Lucky, 128 Wn.2d 727, 735, 912 P.2d 483 (1996). “Stare decisis likewise holds the courts of the land together, making them a system of justice, giving them unity and purpose, so that the decisions of the courts of last resort are held to be binding on all others.” Ray, 130 Wn.2d 673 at 677, *citing* State ex rel. State Fin.Comm. v. Martin, 62 Wn.2d 645, 665-66, 384 P.2d 833 (1963). “The continuity of legal principles allows citizens to choose courses of action with a reasonable expectation of what the future legal consequences will be, even if those consequences might not arise for a considerable period of time.” Crown Controls, Inc. v. Smiley, 110 Wn.2d 695, 704-705, 756 P.2d 717 (1988). Robinson should not be discarded unless B.R. can

show that the decision is incorrect or harmful. State v. Ray, 130 Wn.2d 673 at 679. Requiring that revocation hearings be handled in a similar manner to pre-conviction proceedings would cause undue burden on the State, and would undermine the minimal due process standard that has been long established in Morrissey.

2. THE STATE IS NOT REQUIRED TO SHOW THAT A VIOLATION OF A SUSPENDED SENTENCE IS “WILLFUL” UNDER RCW 13.40.160(3)(b)(ix).

RCW 13.40.160 deals with the courts authority to place a defendant on a special sex offender disposition alternative [SSODA]. After an examination, the court may consider placing a defendant on a SSODA and suspend the execution of the disposition, while placing the defendant on community supervision for at least two years. RCW 13.40.160(3)(a)(v).

RCW 13.40.160(3)(b)(ix) states:

If the offender violates *any* condition of the disposition or the court finds that the respondent is failing to make satisfactory progress in treatment, the court may revoke the suspension and order execution of the disposition or the court may impose a penalty of up to thirty days’ confinement for violating conditions of the disposition. The court may order both execution of the disposition and up to thirty days’ confinement for the violation of the conditions of the disposition. (emphasis added).

The applicable statute dealing with adult offenders who are on a special sex offender sentencing alternative is RCW 9.94A.670 and has similar language as RCW 13.40.160 in regards to revocation of a SSOSA.

RCW 9.94A.670(10) states:

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 offender violates the conditions of the suspended sentence, or (b) the court finds that the offender is failing to make satisfactory progress in treatment.

RCW 13.40.160(3)(b)(ix) and RCW 9.94A.670(10) do not require a finding of willfulness in order to revoke a SSODA or SSOSA. In State v. McCormick, the court ruled that RCW 9.94A.670(10) does not require that a violation be willful. State v. McCormick, 141 Wn.App. 256, 262, 169 P.3d 508 (2007). “Proof of violations need not be established beyond a reasonable doubt, but must reasonably satisfy the court that the breach of condition occurred.” State v. McCormick, 141 Wn.App. 256 at 262-63.

In this case, RCW 13.40.160(3)(b)(ix) is similar to RCW 9.94.670(10) and does not include language that would require a court to find that a violation was willful. It was enough for the court to find that B.R. had violated the conditions of his SSODA, and that the court was imposing the original sentence.

B.R. argues that RCW 13.40.200(3) requires a willful finding, therefore, RCW 13.40.160(3)(b)(ix) should require a finding of willful. However, RCW 13.40.200(3) deals with violations of community supervision, and not with revocation of a suspended sentence. A defendant on community supervision has already been sentenced and had the consequences imposed, while a defendant who has had his sentence suspended has not had the sentence imposed as long as certain criteria are adhered to.

In this case, the court could have immediately sentenced B.R. to a commitment to the JRA in the standard range; however, RCW 13.40.160 has given defendants an opportunity to stay in the community while undergoing treatment. “When interpreting a statute, we first look to its plain language.” Homestreet, Inc. v. State of Washington Department of Revenue, 2009 WL 1709310 (June 18, 2009), *citing* State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). “If the plain language is subject to only one interpretation, our inquiry ends because plain language does not require construction.” Homestreet, Inc., 2009 WL 1709310, *citing* State v. Thornton, 119 Wn.2d 578, 580, 835 P.2d 216 (1992). “A court is required to assume the Legislature meant exactly what it said and apply the

statute as written.” Homestreet, Inc., 2009 WL 1709310, *citing* Duke v. Boyd, 133 Wn.2d 80, 87, 942 P.2d 351 (1997).

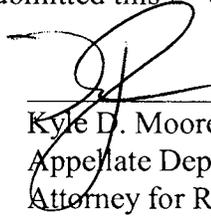
RCW 13.40.160(3)(b)(ix) does not state a requirement to prove a violation was willful, and like in McCormick, the court should find that the statute does not require a finding of willfulness in order to revoke a suspended sentence.

In the alternative, if there is a requirement to find a willful violation, the State would argue that B.R.’s actions were willful. B.R. was told by Rick Ackerman that he could not be any place unsupervised, could not be with anyone more than twenty-four months younger than him, and that he could not go to any place that children may congregate to. RP 23-24. Four days after entering into the contract, B.R. was found in the park with five children under the age of ten years. RP 8. B.R. admitted that he knew that he was not supposed to be in the park. RP 8-9. The record shows that B.R. acted in a willful manner.

E. CONCLUSION

For the reasons set forth above, the State respectfully requests that this court affirm the revocation of B.R.’s SSODA.

Respectfully submitted this 2th day of July 2009.

A handwritten signature in black ink, appearing to be 'K. Moore', written over a horizontal line.

Kyle D. Moore, WSBA #34181
Appellate Deputy Prosecutor
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the mail with proper postage thereon, or caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

Nielson, Broman, & Koch
1908 E. Madison Street
Seattle, Washington 98122

Marianne White
Legal Assistant

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Date

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