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COURT OF APPEALS NO. 63979-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFERY HAAS,

Appellant.

REC'D
JAN 29 2010
COURT OF APPEALS
STATE OF WASHINGTON

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

The Honorable Hollis R. Hill

OPENING BRIEF OF APPELLANT

DANA M. LIND
Attorney for Appellant

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

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A. ASSIGNMENT OF ERROR

The revocation of appellant's suspended sentence violated his right to due process and was therefore invalid.

Issue Pertaining to Assignment of Error

Where there was no showing in the record the hearsay evidence was demonstrably reliance nor any comment on the difficulty or expense in procuring live witnesses, did the trial court's reliance on the violation report violate appellant's due process rights?

B. STATEMENT OF THE CASE

On September 5, 2008, the King County prosecutor charged appellant Jeffery Haas with failing to register. CP 1-4. He pled guilty to a reduced charge of attempted failure to register and was sentenced to twelve months on condition he serve 30 days in jail and one year of probation. CP 6-21.

The judgment and sentence states:

The defendant shall be on probation under the supervision of the Washington State Department of Corrections and comply with the standards [sic] rules and regulations of supervision. Probation shall commence immediately but is tolled during any period of confinement. The defendant shall report for supervision within 72 hours of this date or release date if in custody. The length of probation shall be 12 months.

CP 23.

On January 8, 2009, the prosecutor sent a violation report to the court alleging two violations of probation:

ALLEGATION #1

Failing to obey all laws by failing to register with the Pierce County Sheriff's Office as a registered sex offender on or about 1-7-09 in Pierce County, WA.

ALLEGATION #2

Failing to receive approval from the Department of Corrections prior to changing residences on or about 12-19-08 in Pierce County, WA.

CP 29.

In a section entitled "Supporting Evidence," the state alleged Haas was required to notify the department of any change in address:

[T]he Court placed Mr. Haas on 12 months Probation under the supervision of the Department of Corrections and ordered him to report to his assigned CCO as directed. Mr. Haas was also ordered to comply with all the rules, regulations and conditions of supervision, obey all laws and advise CCO of any address changes. On 10-30-08 Mr. Haas refused to sign the Department's Standard Conditions, Requirements and Instructions form acknowledging the above conditions. He was provided a copy of his conditions. This form also states Mr. Haas is required to abide by verbal or written instructions as directed by his CCO.

CP 29 (emphasis added).

On February 2, the court found Haas guilty of changing his address "without notice to or permission of DOC," imposed a 60-day sanction and extended probation until December 1, 2009. CP 33-34.

In March 2009, the prosecutor sent a second notice to the court, alleging the following violations:

ALLEGATION #1

Failing to receive approval from the Department of Corrections prior to changing residences on or about 3-10-2009 in Pierce County, WA.

ALLEGATION #2

Failing to report to the Department of Corrections as directed since on or about 3-16-2009 in Pierce County, WA.

ALLEGATION #3

Failing to report to the Department of Corrections since on or about 3-17-2009 in Pierce County, WA.

Supp. CP ___ (sub. no. 18, Order for Bench Warrant, 4/15/09).

In the "Supporting Evidence" section, the report again alleged Haas was required to "advise [his] CCO of any address changes." Id. Regarding the alleged violation of that requirement, the report alleged:

On 2-27-2009 I received a phone call from Mr. Haas stating he was no longer able to live at his current address in Buckley due to not being able to afford the rent. He stated he needed to reside with his brother in Auburn for no longer than two weeks. I

discussed this matter with Community Corrections Supervisor Karen Blatman-Byers and Mr. Haas was granted a travel pass for two weeks to reside in Auburn. On this date Mr. Haas was directed to inform me before he moves to another residence and to pick up his travel pass to reside in King County. To date Mr. Haas never picked up the travel pass as directed.

On 3-5-2009 Mr. Haas contacted me and stated he was looking for a place to live. Mr. Haas was again directed to inform me prior to moving so I would have time to verify the address. Mr. Haas stated compliance on this date.

On 3-10-2009 I received a phone call from Mr. Haas stating he had moved to a residence in Midland WA. He stated he was working fixing up a home and was parking his trailer in the back yard. He stated he moved from his brother's house the weekend of **3-7-2009**. He stated his brother needed to move and he helped his brother with the move. I asked him at this time why he had not contacted me prior to moving to another address and he stated he just informed me.

Id. (Emphasis added). The report was signed by Blatman-Byers and asserted a CCO would testify to the allegations. Id.

At a hearing on July 28, 2009, the prosecutor recited his belief Haas intended to admit the allegations but would argue the department could not require him to obtain permission to change addresses. To that end, the prosecutor asserted brief argument would be appropriate. RP 3. In response, defense counsel did not state the allegations were admitted. Rather, he stated only that he did not believe DOC had the authority to require prior approval for a residence change:

MR. ANDERSON [prosecuting attorney]: . . . My understanding – usually we just kind of proceed with are the allegations admitted or not. My understanding from the defense is that the defendant is admitting essentially the actions that underlie the basis for the allegations, but doesn't believe that the – that probation had the right to require him to do so.

If that is the case, I think we can just have some argument on that.

MR. FRANKLIN [defense counsel]: And your honor, for the record, Chris Franklin on behalf of Mr. Haas.

The issue in regards to allegation number one, Mr. Haas's position is, and I tend to agree, is that DOC is trying to violate him for a condition that they don't necessarily have the right to impose anyway, and so in term of –

RP 3.

At this point, the court interjected, questioning whether Haas' position was that DOC could not require him to disclose his residence. Franklin explained it was Haas' position that the department could not require *advance* approval, as the sentencing court imposed no such condition. RP 3-5. While such a requirement was standard for felony offenders, it was not a requirement imposed on misdemeanants. RP 7-8.

The court disagreed, reasoning the judgment and sentence required Haas "to comply with the standards, rules and regulations of supervision" and that the department's form regarding "conditions, requirements and instructions of supervision" includes

the condition to “notify the community corrections officer before changing residence or employment.” RP 6. The court apparently had a copy of the form reportedly given to Haas by the CCO. RP 6-7.

Defense counsel thereafter turned the floor over to Haas to explain his position. RP 9-10. After explaining why he did not believe DOC had the authority to require advance notice of address changes, Haas denied that he violated the DOC-imposed requirement in any event:

Before I moved this time, I told her I was moving, and I was going to be in Tacoma and I told her I was going to be at one or two addresses. I don't know which one because both houses need to be worked on, and I moved there because I was at my brother's, and he was moving.

I was there for a week. I had to move because he moved out, and this was the only place I could find, and I told her before I moved that I was going to one of these two houses that are a matter of a couple blocks apart.

And so I moved on Monday – I moved on the weekend; Monday I told her where I was, what the address was, and I went and registered on Monday when I knew which address I was going to.

RP 11-12.

In response, the court expressed confusion as to whether Haas was admitting the violations. Defense counsel reiterated merely that Haas was trying his best to maintain compliance:

THE COURT: Well, I guess I am wondering – I have read the – I am still not clear as to whether, Mr. Franklin, your client is admitting the three violations or not?

It sounds like he is admitting them with explanation, which I have now heard. Is that correct?

MR. FRANKLIN: I mean that – I think in essence that – I mean technically he is acknowledging –

THE COURT: um-hum?

MR. FRANKLIN: -- but I do think what he is trying to articulate is that he is trying to do his very best to maintain compliance, and I think that, again, in terms of what we really want him to do, he is doing, which is that he is registering with the sheriff and keeping them notified as to where he is living and what his residence is so that there are no safety concerns and issues, and again, the court –and he had no choice, your honor, but in this particular case, the court did not require him to, as is typical in a sex case, no contact with minor children –^[1]

RP 15.

When the court interrupted, stating contact with minors was not the issue, the prosecutor interjected his opinion Haas was just making excuses for non-compliance with the terms of probation.

RP 16-17. The prosecutor asked the court to revoke Haas' sentence. RP 17.

¹ Haas had earlier explained to the violation court that he and the sentencing court carefully addressed the conditions of Haas' sentence. Initially, the court was going to impose a requirement he have no contact with minor children. However, because Haas has visitation rights with his biological son, the court did not impose that condition. RP 11.

Despite Franklin's hearsay objection, the court found Haas violated probation by failing to inform his CCO of his address change:

As far as looking at – this is not the first time Mr. Haas has been in front of me for probation violations. It is the second time, and as I look at the record in this case, I don't find compliance.

I find Mr. Haas, from day one, refusing to sign the conditions of probation; I find him refusing to provide an address; I find him getting aggressive with the community corrections officer; I find him disappearing when he is supposed to be reporting a change of address; not coming in when they attempt numerous times to find him and ask him to come in, telling them that he is moving to his brother's; his brother saying that he doesn't – is not aware of what is going on.

You know, just again and again, I don't see compliance here, and I'm going to revoke his probation.

MR. FRANKLIN: And your honor, if I can just note, your honor, I understand the court is using the report to base that information on; however, that DOC officer is not present, and we would object under State v. Adraman (phonetic)^[2] to the Court considering that information, because Mr. Haas doesn't have a right to confrontation, but due process, under that case, does at least guarantee that he have the ability to confront those adverse witnesses, in terms of specific information. I think that --

² It appears counsel is referring to State v. Abd-Rahmaan, 154 Wn.2d 280, 111 P.3d 1157 (2005) (due process guarantees right to confront adverse witnesses in sentence modification hearings unless good cause exists not to allow the confrontation).

THE COURT: What was the finding on the initial violations the first time this case was before this court?

MR. ANDERSON: Your honor found a violation of changing address without notice and imposed 60 days.

...

THE COURT: Okay, so that one has already been adjudicated, the first probation violation, and I don't even need the underlying facts to look to the record here and find that Mr. Haas's probation has already been violated once, and this is the second time – this is the second time with the same explanation or excuse or whatever you want to call it, that the department doesn't have the authority to supervise him in this way, and I believe it was made perfectly clear in the judgment and sentence, and in the conditions of probation that you client refused to sign, that they do have that authority, so I am going to violate your probation, Mr. Haas, because I am finding that you have intentionally violated the conditions of your probation.

RP 21.

In keeping with its oral ruling, the court terminated Haas' probation and imposed the remainder of his suspended sentence.

CP 35. This appeal follows. CP 37.

C. ARGUMENT

THE COURT REVOKED HAAS' PROBATION IN VIOLATION OF HIS DUE PROCESS RIGHTS.

Haas did not admit he violated probation by failing to inform DOC of a change of address or by failing to seek prior approval of that change. On the contrary, he testified he informed his CCO well in advance of his two proposed future residences and thereafter immediately informed her of the one that was obtained. The only evidence the court could have relied on to support the contrary conclusion was the out-of-court hearsay of his CCO, whom the state intended to call as a witness, but for whatever reason, did not. The revocation therefore violated Haas' right to due process and to confront adverse witnesses.

The Fourteenth Amendment guarantees minimum due process requirements because parole revocation involves deprivation of a conditional liberty. Morrissey v. Brewer, 408 U.S. 471, 480, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). The following minimum due process protections are required in a parole revocation hearing:

- (a) written notice of the claimed violations of parole;
- (b) disclosure to the parolee of evidence against him;
- (c) 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. at 489 (emphasis added).

These requirements exist to ensure that a revocation of parole will be based on verified facts and accurate information of the parolee's behavior. However, the Morrissey court stated the process should be flexible, allowing the admission of evidence that would not be admitted in an adversary criminal trial, including letters and affidavits. Morrissey, 408 U.S. at 489; see also Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973) (probation revocation require same due process rights); State v. Dahl, 139 Wn.2d 678, 990 P.2d 396 (1999) (applying Morrissey requirements to a revocation hearing).

In Dahl, the issue before the Court was whether an individual's due process rights were violated by the trial court's admission of hearsay evidence at a revocation hearing. Finding that the minimal due process right to confront was not absolute, the court held, "Morrissey requires that a finding of a parole violation be 'based on verified facts and that the [court's] exercise of discretion

will be informed by an accurate knowledge of the parolee's behavior.” Dahl, 139 Wn.2d at 688 (quoting Morrissey, 408 U.S. at 484). Because the hearsay evidence presented was neither demonstrably reliable nor necessary in that case, the court held that Dahl's due process rights were violated. Dahl, 139 Wn.2d at 687.

Defense counsel's citation to Abd-Rahmaan was directly on point. State v. Abd-Rahmaan, 154 Wn.2d 280, 111 P.3d 1157 (2005). In that case, the state alleged Abd-Rahmaan violated his sentence by failing to report to his CCO Chris Salatka. Abd-Rahmaan, 154 Wn.2d at 283. In support of the allegation, Salatka testified Abd-Rahmaan was supposed to report on any day he did not work at the Millionair's Club. The CCO claimed that when he went to follow up with the Millionaires' Club on the days Abd-Rahmaan indicated he worked, however, Salatka learned Abd-Rahmaan had been fired and was not working the days he indicated.

He was terminated from the Federal Express on the first day he was working for them. And the reason why he was terminated was because they claimed he was dropping products. And he was, I guess he was. It was his job to carry the expensive boxes of alcohol, and he dropped several boxes. So they requested him to leave. And at that time Mr. Abd-Rahmaan,

according to this particular person at Federal Express, accused him of making threatening and intimidating gestures. They told him they felt unsafe and wanted him out of there. Now, when I followed up with what happened, after the polygraph, the Millionaires' [sic] Club reported to me that he was not allowed to work through the service of the Millionaires' [sic] Club because of what he did at the Federal Express. And, in addition, because Mr. Abd-Rahmaan did not disclose his status.

Id.

Despite Abd-Rahmaan's objection to Salatka's statements as unreliable hearsay, the court admitted the evidence without giving a reason. After giving Abd-Rahmaan an opportunity to state his version of events, the court found he violated probation by failing to report. Id. at 283-84.

On appeal, Abd-Rahmaan argued the trial court erred in admitting the hearsay evidence without making specific findings of good cause. The Supreme Court agreed:

"Good cause has thus far been defined in terms of the difficulty and expense of procuring witnesses in combination with 'demonstrably reliable' or clearly reliable' evidence." State v. Nelson, 103 Wash.2d 760, 765, 697 P.2d 579 (1985). The trial court here made no record to support a conclusion that there was good cause to admit the hearsay evidence. There was neither a showing in the record that the hearsay evidence was demonstrably reliable nor was there any comment on the difficulty or cost in procuring live witnesses. . . . Unlike the Court of Appeals, we find the record below insufficient to

establish good cause for the admission of the hearsay evidence or the reasons for the trial court's decision. The modification of Abd-Rahmaan's sentence is invalid to the extent the trial court admitted and relied on the hearsay evidence provided by the CCO's testimony.

Abd-Rahmaan, 154 Wn.2d at 290-91.

The record here is similarly infirm. Like the trial court in Abd-Rahmaan, the trial court here made no record to support a conclusion that there was good cause to admit the hearsay evidence. There was neither a showing in the record that the hearsay evidence was demonstrably reliable nor was there any comment on the difficulty or cost in procuring live witnesses. Indeed, the violation report indicated the CCO would testify. Although the prosecutor appeared to assume Haas intended to admit the violations, Haas did not. Nor did he waive his due process rights to demonstrably reliable evidence, as evidenced by his specific objection. The revocation of Haas' suspended sentence was therefore invalid.

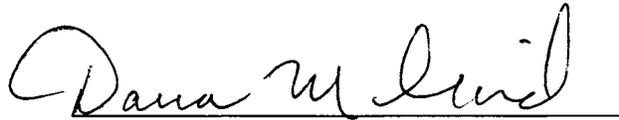
D. CONCLUSION

For these reasons, the court's order revoking Haas' probation should be reversed.

Dated this 29th day of January, 2010.

Respectfully submitted

NIELSEN, BROMAN & KOCH

A handwritten signature in cursive script that reads "Dana M. Lind". The signature is written in black ink and is positioned above a horizontal line.

DANA M. LIND, WSBA 28239

Office ID No. 91051

Attorneys for Appellant