68849-9

68849-9

NO. 68849-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JASON P. MATHISON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE PATRICK OISHI
THE HONORABLE MICHAEL J. FOX

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

1. Due process requires notice of the conditions of a sentence so an offender knows what conduct is proscribed. The trial court granted Mathison a SSOSA[1] sentence on September 30, 2005. Mathison was ordered to undergo sex offender treatment for three years and to successfully complete the treatment. As a condition of his lifelong community custody, he was ordered to participate in SSOSA treatment until successful completion pursuant to an evaluation that anticipated his treatment would last "three years plus." Mathison was also verbally informed by the trial court that he had to successfully complete treatment for "a period of three years or however long it takes to so successfully complete the program." After sentencing, Mathison attended treatment for approximately six years before being terminated for his violation behavior. At his revocation hearing, he expressed frustration at attending treatment without knowing when he would successfully complete the treatment program. Did Mathison have sufficient notice that he was required to attend treatment until its successful completion?

[1] Special Sex Offender Sentencing Alternative.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Jason Mathison was originally charged with three counts of Rape of a Child in the First Degree. CP 1-2. The State alleged that Mathison raped his nine-year-old neighbor multiple times over the course of five months. CP 3-6. Mathison pleaded guilty to two counts of Rape of a Child in the First Degree and one count of Possessing Depictions of Minors Engaged in Sexually Explicit Conduct. CP 8-35. The trial court sentenced Mathison on September 30, 2005 and granted a Special Sex Offender Sentencing Alternative (SSOSA). CP 36-52. The trial court revoked Mathison's SSOSA on May 18, 2012 after two hearings. CP 139-40; 3RP[2]; 4RP.

2. SUBSTANTIVE FACTS.

Between September 2004 and February 2005, Mathison occasionally looked after his nine-year-old neighbor, P.I., while her father was at work. CP 3. During this period, Mathison raped P.I. multiple times through oral sex, digital penetration, and penile

[2] There are 4 volumes of verbatim report of proceedings. They will be referred to as follows: 1RP (Aug. 18, 2005); 2RP (Sep. 30, 2005); 3RP (Mar. 29, 2012); and 4RP (May 18, 2012).

penetration. CP 3-6. Mathison showed P.I. pornography on his television and on his computer. CP 3-6. Mathison also set up an internet profile for P.I. on his computer and watched while P.I. undressed in front of a web camera while she "chatted" with another person online. CP 3-6. Police learned of Mathison's actions after P.I. disclosed to a school friend that she had been "doing it" with Mathison. CP 3-6.

Mathison pleaded guilty to two counts of Rape of a Child in the First Degree and one count of Possessing Depictions of Minors Engaged in Sexually Explicit Conduct. CP 8-35. At sentencing, the trial court imposed a SSOSA sentence with an agreed exceptional period of incarceration above the standard range and community custody for life. CP 36-47. Mathison was released from jail in December 2005. CP 48.

On March 19, 2012, the first of two hearings was held to address violations of Mathison's sentence from two Department of Corrections (DOC) reports. 3RP 1-5; CP 53-66. The reports outline ten allegations, as follows:

1. Failing to disclose a romantic relationship with a 19 year-old female to the treatment provider and Community Corrections Officer (CCO).
2. Having unapproved minor contact by bathing E.P., a one year-old.

3. Having unapproved minor contact by changing the diapers and clothing of E.P., a one year-old.
4. Having unapproved minor contact by being in the residence of Tina Boss, when A.S., a 15 year-old, was present.
5. Having unapproved minor contact by being in the residence of Tina Boss, when B.S., a 17 year-old, was present.
6. Having unapproved minor contact by being in the residence of Tina Boss, when "J.," a 17 year-old, was present.
7. Having unapproved minor contact by being in the residence of Tina Boss, when "M.," a 16 year-old, was present.
8. Having unapproved minor contact by being in the residence of Tina Boss, when S.W., a two year-old, was present.
9. Having and maintaining an unapproved Facebook account under a pseudonym, "Jason Stilleto."
10. Being terminated from sex offender treatment.

CP 53-66. Mathison admitted all of the above violations with explanation except for violation number two, which was denied. 3RP 8, 24. After hearing testimony from Mathison's CCO, the court ordered a second revocation hearing to address additional violation behavior and to arrange for witness testimony. 3RP 38-39.

After the first violation hearing, another report was issued by Mathison's CCO alleging the following additional violations:

11. Purchasing a secret laptop computer for viewing pornography without the knowledge or consent of the treatment provider or CCO.
12. Accessing the internet for the purpose of viewing pornography.

13. Having unreported and unapproved minor contact by driving minor females home from raves on several occasions.
14. Manipulating the polygraph testing process to avoid detection of violation behavior.

CP 68-72.

The second revocation hearing was held on May 18, 2012. 4RP 1-6. At the hearing, the State and Mathison each called two witnesses to testify. 4RP 3. Mathison did not admit or deny the additional violations. 4RP 118-26. Despite a condition of community custody requiring Mathison's compliance with all treatment rules and recommendations, Mathison argued that his conduct under violations 11-14 constituted a violation of his treatment rules, not a violation of the conditions of his sentence. CP 40, 44; 4RP 1-6, 118-26.

The trial court found that Mathison had violated the terms of his sentence by being terminated from treatment, having unapproved contact with minors, purchasing a secret laptop, accessing the internet to view pornography, driving minor females home from raves, and manipulating polygraph tests to avoid the

detection of violation behavior.[3] 4RP 126-28. The court revoked Mathison's SSOSA, requiring him to serve his prison sentence. 4RP 133-34. In revoking the SSOSA, the trial court stated, "[t]his is too egregious a series of facts, about as egregious of facts as you can have in a violation hearing, short of new offenses." 4RP 133-34.

C. ARGUMENT

1. MATHISON RECEIVED PROPER NOTICE THAT HE WAS REQUIRED TO REMAIN IN TREATMENT THROUGH ITS SUCCESSFUL COMPLETION.

Mathison alleges that his due process rights were violated because the State failed to provide notice that he was required to successfully complete sex offender treatment, which could span beyond three years. Mathison is incorrect. The record clearly shows that Mathison was given adequate notice. Furthermore, he has failed to preserve any due process claim because he failed to object in the trial court.

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[3] Although Mathison admitted to violations number one (failing to disclose a romantic relationship to a nineteen-year-old), three (having unapproved minor contact with a minor by changing the diapers and clothing of a one-year-old), and nine (having and maintaining an unapproved Facebook account under a pseudonym "Jason Stilleto"), the trial court did not specifically address these alleged violations in its findings. 4RP 126-28.

Imposition of a SSOSA sentence is an extraordinary privilege afforded to a select group of individuals. The 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. RCW 9.94A.670. As a threshold matter under the SSOSA statute, not only must an offender meet certain statutory requirements to be eligible to receive a SSOSA, the offender must be deemed amenable to treatment by a State-certified sexual deviancy treatment provider.[4] Id. A SSOSA sentence may be revoked at any time where there is sufficient proof to reasonably satisfy the trial court that the defendant has violated a condition of the suspended sentence or has failed to make satisfactory progress in treatment. State v. McCormick, 166 Wn.2d 689, 705, 213 P.3d 32 (2009); RCW 9.94A.670(10). Once a SSOSA is revoked, the original sentence is reinstated. State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999).

A trial court's decision to revoke a SSOSA is reviewed for an abuse of discretion. State v. Partee, 141 Wn. App. 355, 361, 170 P.3d 60 (2007). A trial court abuses its discretion only where the

[4] To qualify for a SSOSA sentence, an offender must not have any prior convictions for sex offenses and must have a standard range of less than 11 years. RCW 9.94A.670.

trial court's decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The revocation of a SSOSA is not a criminal proceeding. Dahl, 139 Wn.2d at 683. Accordingly, the due process rights afforded at a revocation hearing are not the same as those afforded at the time of trial. In re Personal Restraint of Boone, 103 Wn.2d 224, 230, 691 P.2d 964 (1984). An offender facing revocation of a suspended sentence has only minimal due process rights. State v. Nelson, 103 Wn.2d 760, 763, 697 P.2d 579 (1985); Dahl, 139 Wn.2d at 683. Sexual offenders who face SSOSA revocation are entitled to the same minimal due process rights as those afforded during the revocation of probation or parole. State v. Badger, 64 Wn. App. 904, 907, 827 P.2d 318 (1992); Dahl, 139 Wn.2d at 683.

The United States Supreme Court has determined the minimal due process requirements of parole violations. Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed.2d 484 (1972). This includes written notice of the claimed violations and disclosure of the evidence. Id. at 489. The purpose of notice is to allow the offender "the opportunity to marshal facts in his defense." Dahl, 139 Wn.2d at 684 (citing Morrissey, 408 U.S. at 489).

A trial court retains jurisdiction to impose sanctions for sentence violations until a certificate of discharge issues or the maximum term of sentence is reached. State v. Raines, 83 Wn. App. 312, 317, 922 P.2d 100 (1996).

a. Relevant Facts.

At Mathison's plea and sentencing hearings, he was informed that he would be required to complete treatment as *both* a condition of a SSOSA sentence and as a condition of community custody.[5] In Mathison's plea statement, he acknowledged that he would be placed on community custody for the maximum period of life. CP 10. As part of his community custody, Mathison recognized, "I will have restrictions and requirements placed upon me and I may be required to participate in rehabilitative programs." CP 10. In his plea statement, Mathison affirmed that, if granted a SSOSA, along with the conditions of community custody and incarceration, "I will be ordered to participate in sex offender treatment." CP 14. Mathison further acknowledged in his plea

[5] Although former RCW 9.94A.670 does not require "successful completion" of treatment as a condition of a SSOSA sentence, former RCW 9.94A.120(8)(a)(ii)(B) permits the court to impose "other sentence conditions," which in this case was successful completion of treatment.

statement: "If a violation of the sentence occurs during community custody, the judge may revoke the suspended sentence." CP 14.

At Mathison's sentencing hearing, he was granted a SSOSA sentence and community custody was imposed for the length of the maximum sentence (life). CP 40. As a condition of his SSOSA, Mathison was ordered to sex offender treatment "for three years... and enter, make reasonable progress in, and *successfully complete* a specialized program for sex offender treatment..." CP 40 (emphasis added). As a condition of community custody outlined in Appendix H, Mathison was ordered to participate in "SSOSA treatment pursuant to sex[ual] deviancy evaluation...with all treatment recommendations, attached." CP 44. In the attached evaluation, Mathison was required to "successfully complete" treatment. CP 45. In describing Mathison's treatment plan, the attached evaluation estimated the duration of his group treatment as "three years plus." CP 46. At sentencing, the trial court verbally ordered Mathison to "enter into, make reasonable progress, and *successfully complete* a program for the treatment of sexual deviancy for a period of three years or *however long it takes to so successfully complete the program.*" 2RP 17 (emphasis added).

From Mathison's release from incarceration in December 2005 to his arrest for violations in January 2012, he participated in treatment for approximately six years without successfully completing treatment. CP 59. Mathison's treatment providers explained that, due to his previous relationships and the "secretive nature of those relationships," they did not believe that Mathison was ready to complete treatment. CP 59.

In Mathison's revocation hearing memorandum, he noted that he was informed in his initial treatment evaluation, completed prior to sentencing, that group treatment was estimated to last for "three years plus." CP 74. Throughout the SSOSA revocation process, which spanned several months, Mathison never objected to the listed violation of being terminated from treatment, nor did he suggest that he was unaware that he was still required to be in treatment as a condition of his sentence.[6] To the contrary, after Mathison was eventually terminated from treatment by his original provider in 2012, he requested acceptance into another provider's sex offender treatment program. CP 92. Additionally, in his allocution following the revocation of his SSOSA sentence, Mathison expressed his frustration at not knowing when his

[6] Mathison admitted to violation number 10, alleging that he was terminated from treatment by his treatment provider. 3RP 8, 24.

conditions would end: "Treatment was like, I mean, I attended treatment, but over time it just became so, I didn't know when I could be released or when community custody would ever end and I could move on with my life." 4RP 136.

b. Mathison Waived Any Due Process Violation By Failing To Object.

A person accused of violating the conditions of sentence has some responsibility for protecting his minimal due process rights. State v. Robinson, 120 Wn. App. 294, 297, 85 P.3d 376 (2004). At a minimum, the accused must notify the court, through an objection, of a violation of due process. Id. at 297.

In State v. Nelson, the court held that a defendant could not sit by while his due process rights were violated at a hearing and then allege due process violations on appeal. 103 Wn.2d 760, 697 P.2d 579 (1985). The same principle applies to notice requirements. In Robinson, the court held, "improper notice should be treated in the same manner, as notice is also an element of due process under Morrissey." 120 Wn. App. 294. Because Robinson did not object to notice at the modification hearing, he waived the

notice requirements and we will not address the issue on appeal. Robinson, 120 Wn. App. at 299-300.

Here, Mathison did not object once based on lack of notice. The process of revoking his SSOSA took several months, and Mathison never suggested that he lacked notice that, as a condition of his sentence, he was still required to be in treatment. Furthermore, in Robinson, this Court pointed out that "it is apparent that Robinson was prepared to address the merits of the allegations at the hearing." Id. at 300.

Likewise, the record demonstrates that Mathison was aware he was required to be in treatment until its successful completion. Mathison received numerous written and verbal notices at his plea and sentencing hearings of the requirement that he complete treatment. CP 10, 14, 40, 44-46; 2RP 17. Along with those notices, Mathison demonstrated through his own actions and comments that he knew he was required to still be in treatment. CP 59, 74, 92; 4RP 136. Contrary to Mathison's assertion that he believed he was only required to attend three years of treatment, Mathison participated in treatment continuously for over six years. CP 59. Mathison did not, at any time, cease attending treatment until he was terminated from the program due to violations. CP 59,

63-66. After being terminated from that program, Mathison then sought admission to a different sex offender treatment program. CP 92. Additionally, Mathison noted, after the revocation of his SSOSA, that he had been frustrated with not knowing when his treatment program would end. 4RP 136. Mathison's own actions and words demonstrate his knowledge that he was required to participate in treatment until its successful completion.

Mathison was given notice that he was required to participate in treatment until its successful completion even if that extended beyond three years. He failed to preserve any due process violation by failing to object to a lack of notice before the trial court.

c. Mathison Received Proper Notice That He Was Required To Successfully Complete Treatment, Even If That Required Treatment Beyond Three Years.

Mathison claims that he was not provided notice that he was required to successfully complete treatment. The record does not support Mathison's argument. Mathison was provided with several written and verbal notices that he would be required to complete treatment as a condition of his SSOSA sentence and as a condition

of community custody, even if such completion necessitated more than three years of treatment. Furthermore, the record demonstrates that Mathison had actual notice of this requirement.

Due process requires that a person be afforded fair warning of proscribed conduct. Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). Due process notice can be demonstrated with evidence that the offender received actual notice of proscribed conduct. In State v. Harris, a defendant on a SSOSA was deaf; he argued that he did not have adequate notice of the conditions of his supervision because there was no sign language interpreter provided during meetings with his CCO. 97 Wn. App. 657, 985 P.2d 217 (1999). This Court rejected this argument because the evidence showed that Harris had actual notice of "clear guidelines for his conduct." Id. at 656. Harris's CCO met with him and went over his judgment and sentence and he seemed to understand. Id. at 650. The court noted that "Harris's own actions in complying with the conditions of his SSOSA defeat his argument that without an interpreter he did not have adequate notice of what he was required to do." Id. at 655. Harris also was able to comply with numerous conditions of his SSOSA before its revocation. Id. at 655-56.

Like the defendant in Harris, Mathison had actual notice that he was required to remain in treatment until its successful completion as a condition of his SSOSA. Mathison was ordered to complete sex offender treatment both as a condition of his SSOSA sentence and also as a condition of his community custody. Although he was initially ordered to complete treatment within a three-year period, he was provided notice that he may be required to remain in treatment beyond the three-year period if treatment was not yet completed, or if he was ordered into further treatment as a condition of community custody. CP 10, 14, 40, 44-46. The trial court specifically told Mathison at sentencing that he was being ordered to treatment for a period of "three years or however long it takes to so successfully complete the program." 2RP 17.

Also like the defendant in Harris, Mathison demonstrated that he had actual notice by complying with the requirement that he remain in treatment until he successfully completed it. Despite Mathison's current claim that he was not aware that he could be required to remain in treatment beyond a three-year period, Mathison: 1) remained in treatment for over six years; 2) sought out a new treatment provider upon his termination from treatment; 3) never suggested throughout the revocation process that he did

not know he was required to remain in treatment until completion; 4) never objected during the revocation process due to lack of notice; and 5) expressed frustration in remaining in treatment without having a definite timeline for completion of that treatment. CP 59, 92; 4RP 136. Mathison's own previous actions and words contradict his current claim that his due process rights were violated through a lack of notice.

Mathison's contention that the challenged condition of his SSOSA sentence is void for vagueness is also misplaced. The "void for vagueness" requirement of due process is satisfied when citizens have fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). A sentencing condition is unconstitutionally vague if ordinary people cannot understand what conduct is proscribed. Id. at 752-53. In deciding whether a sentencing condition is unconstitutionally vague, the terms are not considered in a vacuum; rather, they are considered in the context in which they are used. Id. at 754 (citing Douglass, 115 Wn.2d at 180). The law is "sufficiently definite" if persons of "ordinary intelligence" can understand what the law proscribes, "notwithstanding some possible areas of disagreement." Id. (citing Douglass, 115 Wn.2d at 179).

Contrary to the requirements of Bahl and Douglass, Mathison is asking this Court to rely on only part of the notice he received concerning his sentence. Mathison points to the notice that he was ordered to participate in treatment for a period of three years, but ignores various forms of notice requiring him to remain in treatment until its successful completion, both as a condition of his SSOSA sentence and as a condition of community custody. CP 40; 2RP 17. Moreover, Mathison's claim that the requirement is void for vagueness is undermined by his own adherence to the requirement.

Mathison also claims that the record is silent and that he was affirmatively misled. He relies on State v. Minor, 162 Wn.2d 796, 800, 174 P.3d 1162 (2008). This case is inapposite. In Minor, the juvenile court did not provide the respondent with oral or written notice of his loss of firearm rights, as required by statute. Id. at 798, 800; former RCW 9.94.047(1)(a) (2003). Here, the record is not silent nor was Mathison affirmatively misled; rather, he was given notice both orally and in writing that he was required to successfully complete treatment. CP 10, 14, 40, 44-46; 2RP 17.

In sum, the record amply demonstrates that Mathison had notice that he was required to remain in sex offender treatment until

its successful completion. Mathison's due process claim is without merit.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm the revocation of Mathison's SSOSA.

DATED this 4 day of February, 2013.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Maureen M. Cyr, attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. JASON P. MATHISON, Cause No. 68849-9 -I, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 5 day of February, 2013

Name
Done in Seattle, Washington