Supreme Court No. 95691-0

(Court of Appeals No. 34704-4-III)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER NOVIKOFF,

Petitioner.

PETITION FOR REVIEW

LILA J. SILVERSTEIN
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
lila@washapp.org
wapofficemail@washapp.org

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A. INTRODUCTION

Christopher Novikoff received a Special Sex Offender Sentencing Alternative ("SSOSA") and worked hard in treatment for over three years. His quarterly treatment reviews consistently characterized Mr. Novikoff's participation as "above average," and Mr. Novikoff never engaged in any sexual misconduct of any kind.

After Mr. Novikoff injured his back, he used marijuana to relieve the pain. His treatment provider did not approve, and she terminated his treatment. Although she was reluctant to give him another chance, she stated she would permit his return if he ceased using marijuana.

Instead of seeking the usual 60-day sanction for a first violation, the State moved to revoke the SSOSA. The trial court "grudgingly" revoked Mr. Novikoff's SSOSA.

This Court should grant review to address important issues of first impression regarding SSOSA revocations. This Court should decide whether "unsatisfactory progress" is a legal conclusion or a factual finding. If it is a factual finding, this Court should determine whether due process requires proof by a preponderance of the evidence. This Court should answer that question in the affirmative, because the "reasonably satisfied" standard is a relic from the days when due process depended on the distinction between a "right" and a "privilege."

B. IDENTITY OF PETITIONER AND DECISION BELOW

Christopher Novikoff, through his attorney, Lila J. Silverstein, asks this Court to review the opinion of the Court of Appeals in *State v. Novikoff* (No. 34704-4-III, filed March 6, 2018). A copy of the opinion is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. A trial court may revoke a SSOSA if it "finds that the offender is failing to make satisfactory progress in treatment." RCW 9.94A.670(11). Is the determination of "unsatisfactory progress" a legal judgment subject to de novo review, or a factual finding reviewed for substantial evidence, or some other type of decision reviewed for abuse of discretion? RAP 13.4(b)(4).

2. If the determination of "unsatisfactory progress" is a factual finding, must the State prove unsatisfactory progress by a preponderance of the evidence because the "reasonably satisfied" standard is a relic from the days when due process depended on a distinction between a "right" and a "privilege?" RAP 13.4(b)(3), (4).

2. Did the trial court err in concluding that revocation of the SSOSA was the only available sanction for a single violation, following three and a half years of successful treatment, where the statutes at issue permit jail terms of up to 60 days as sanctions? And did the Court of

Appeals err in concluding the trial judge understood he had discretion and exercised that discretion? RAP 13.4(b)(4).

D. STATEMENT OF THE CASE

1. After receiving a SSOSA, Mr. Novikoff worked hard and performed well in treatment for several years.

When Christopher Novikoff was a child, he was a victim of repeated sexual abuse at the hands of his uncle. RP 64, 71. Notwithstanding the trauma, he grew up to become a gainfully employed adult who successfully raised two sons. RP 71.

Unfortunately, he eventually repeated the acts perpetrated upon him by sexually offending against his grandchildren. The State charged him with three counts of first-degree child molestation. CP 1-2. He immediately pleaded guilty, stating, "I do not wish to bring any more difficulty to the children." RP 10.

At sentencing, the jail pastor testified that Mr. Novikoff displayed genuine remorse, and a sex offender treatment provider reported that Mr. Novikoff had a low risk to reoffend and was a good candidate for a Special Sex Offender Sentencing Alternative (SSOSA). RP 67, 73; *see* RCW 9.94A.670. The court imposed a SSOSA. It sentenced Mr. Novikoff to 130 months to life in prison, imposed one year in jail, and suspended the remainder of the sentence. The court ordered five years of sex offender

treatment and imposed numerous conditions of community custody. RP 73-90; CP 29-41.

After serving his jail term, Mr. Novikoff began treatment. He worked hard and performed well in treatment for years. RP 167; CP 128-37; CP 122 (court finds Mr. Novikoff's quarterly treatment reviews "were all positive"). Indeed, in most of the quarterly reports, the treatment providers described Mr. Novikoff's participation as "above average." CP 130-37.

The court praised Mr. Novikoff's progress at review hearings. RP 99, 103. In March of 2015, the court told Mr. Novikoff, "you're ahead of schedule. You're doing well." RP 103. Mr. Novikoff graduated from group sessions and progressed to individual sessions just once per month. CP 70; RP 160-61.[1]

2. Mr. Novikoff injured his back and started using marijuana for pain relief, but he never committed a sexual violation of any kind.

In the spring of 2016, Mr. Novikoff severely injured his back, resulting in considerable pain. CP 122. He eventually had to close his construction business because of the injury. *Id.* His doctor prescribed

[1]As the record demonstrates, the Court of Appeals' statement that "Mr. Novikoff did very well at first" is an understatement. Slip Op. at 2. Mr. Novikoff did very well for *years*. CP 122, 128-37; RP 166-67.

hydrocodone, and Mr. Novikoff used it but did not like the side effects. RP 185.

Mr. Novikoff asked his treatment provider and community corrections officer (CCO) if he could use marijuana to alleviate the pain. CP 123; RP 133-34. At first the CCO said he did not have a problem with it, but after consulting with the treatment provider, they conditioned their approval on receipt of documentation confirming that a doctor would monitor Mr. Novikoff's marijuana use. RP 124-25, 150, 163; CP 123.

According to Mr. Novikoff, he immediately requested the necessary document from the VA hospital, but they are "glacial" in responding to such requests. RP 183; *see also* RP 172 (treatment provider similarly testifies that when she left a message with the VA requesting a return call, they never called her back). Mr. Novikoff continued to use marijuana for his pain while he waited for the promised documents. CP 123. The CCO and treatment provider were not pleased that Mr. Novikoff continued to use marijuana before receiving the documents from the VA, and they felt he was not forthcoming when discussing the issue. CP 123-24.

On August 7, 2016, the treatment provider terminated Mr. Novikoff's treatment based on the above concerns. CP 71. She stated, "While at this time, I am not aware of Mr. Novikoff being unsupervised

around minor females, I am concerned with his decision making abilities and actions." CP 71.

That same day or the next day, Mr. Novikoff finally received the required medical documentation and gave it to the CCO and treatment provider. CP 68. The CCO nevertheless filed a "Notice of Violation" on August 8, 2016. CP 64. The alleged violation was "failing to successfully complete sexual deviancy treatment as ordered, by being unsuccessfully terminated on or about 8/7/16." CP 64. This was the first and only violation that had ever been alleged against Mr. Novikoff during the three and a half years he was on community custody and participating in treatment. CP 68; RP 150.

The treatment provider told the CCO that she "would be willing to continue working with Mr. Novikoff." CP 69. She suspended him from treatment because she "hopes he gets the message that this is serious." CP 69.

3. The court revoked the SSOSA based on Mr. Novikoff's single, non-sexual violation following over three years of "above average" participation in treatment.

Notwithstanding the treatment provider's statements indicating that her actions were intended to serve as a wake-up call, and notwithstanding the fact that the alleged violation was the first in over three years of

treatment and community custody, the State moved to revoke the SSOSA. CP 64.

Mr. Novikoff objected to revocation. He emphasized that he was diligent with his treatment program for years, and that his alleged violation did not involve contact with minor children or possession of pornography or other sexual misconduct. RP 212. He pointed out that in most cases defendants are sentenced to jail terms for initial violations, and that the statutes permit this lesser sanction. RP 212; CP 72-76.

The State, on the other hand, claimed that revocation was the only available sanction. RP 145. The court agreed with the State. RP 219-22. The court acknowledged Mr. Novikoff's progress, stating:

> I want to first talk about what you have accomplished here. And it's considerable. There have been no violations for [a] three or four-year period. And you have – another way that Mr. Morgan brought out, you remained a low risk for basically four years. And you passed all the polygraphs, which to me is very telling.

RP 219. The court noted, "You did graduate from group, and then you were in one-on-one setting with Ms. Peterson." RP 220. The judge was sympathetic about Mr. Novikoff's back pain, but said "the crux of the matter" was that he had been terminated from treatment. RP 220. The court stated that even though the treatment provider had reluctantly agreed to continue treating Mr. Novikoff, the only available sanction was to

revoke the SSOSA. RP 222. The court "grudgingly" ordered revocation. RP 222; CP 77; CP 120-27.

On appeal, Mr. Novikoff argued the trial court erred in concluding revocation was the only available option and in concluding he had not made substantial progress in treatment. The Court of Appeals rejected the arguments. It averred the trial judge understood he had discretion to impose lesser sanctions but exercised his discretion to reject those options. The Court of Appeals ruled that the determination of whether a person has made satisfactory progress is a factual finding, yet also stated it is a matter of "judgment." Although the court characterized the determination as a factual finding, it did not review the finding for substantial evidence, but rather for abuse of discretion. The court did not address Mr. Novikoff's argument that if the "unsatisfactory progress" determination is a finding of fact, it must be proved by a preponderance of the evidence.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. This Court should grant review to determine what standard of proof and standard of review apply to a trial court's determination that a SSOSA participant has failed to make satisfactory progress in treatment.

a. Because "unsatisfactory progress" is a matter of judgment, it should be considered a legal conclusion subject to *de novo* review.

A trial court may revoke a SSOSA if it "finds that the offender is failing to make satisfactory progress in treatment." RCW 9.94A.670(11). Although the verb "finds" implies a factual issue, the phrase "satisfactory progress" signals a legal conclusion. Whether a person's performance is "satisfactory" is generally a matter of judgment, not of fact. Indeed, the Court of Appeals characterized the issue as a matter of "judgment" – but in the same sentence held it is a factual finding. Slip Op. at 4-5. Then, instead of applying the "substantial evidence" standard of review generally applied to factual findings, the Court of Appeals reviewed for abuse of discretion. Slip Op. at 5; *Compare* Br. of Appellant at 16 n.3. This Court should grant review to determine whether the "unsatisfactory progress" determination is a legal conclusion or a factual finding, and, if it is a factual finding, which standard of review applies on appeal. RAP 13.4(b)(4).

b. If "unsatisfactory progress" is a factual finding, this Court should hold that due process requires proof by a preponderance of the evidence.

If the determination of whether a SSOSA participant has failed to make satisfactory progress is a factual finding, this Court should address the issue of which standard of proof applies in the trial court. This Court should hold that due process requires proof by a preponderance of the evidence.

The State argued that it need only meet a "reasonably satisfied" standard, relying on *State v. Kuhn*, 81 Wn.2d 648, 650, 503 P.2d 1061 (1972). Br. of Respondent at 20; *see* Reply Br. of Appellant at 5. This standard does not comport with due process, and is a relic from the days when due process depended on the distinction between a privilege and a right, rather than on whether the defendant would suffer a grievous loss of liberty.

The case the State cites for the "reasonably satisfied" standard in turn relies on *State v. Shannon*, 60 Wn.2d 883, 889, 376 P.2d 646 (1962). *See Kuhn*, 81 Wn.2d at 650. There, the Court stated, "The granting of a deferred sentence and probation, following a plea or verdict of guilty, is a rehabilitative measure, and as such is not a 'matter of right but is a matter of grace, privilege, or clemency granted to the deserving, and withheld

from the undeserving,' within the sound discretion of the trial judge."

Shannon at 888. Thus:

> The court need not be furnished with evidence establishing beyond a reasonable doubt guilty by the probationer of criminal offenses. All that is required is that the evidence and facts be such as to *reasonably satisfy* the court that probationer is violating the terms of his probation, or engaging in criminal practices, or is abandoned to improper associates, or living a vicious life.

Id. at 888-89 (internal citations omitted) (emphasis added).

One of the cases the *Shannon* court relied on was *Escoe v. Zerbst*, 295 U.S. 490, 55 S.Ct. 818, 79 L.Ed.1566 (1935). *See Shannon*, 60 Wn.2d at 888, 889. There, the U.S. Supreme Court held that although the *statute* at issue guaranteed a hearing prior to the revocation of probation, *due process* did not require notice or a hearing prior to revocation:

> [W]e do not accept the petitioner's contention that the privilege has a basis in the Constitution, apart from any statute. Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose.

Escoe, 295 U.S. at 492-93. According to the Court, Congress had the power "to dispense with notice or a hearing" in the context of probation revocation if it wanted to do so. *Id.* at 493.

The Court of course subsequently held to the contrary in *Morrissey v. Brewer*[2] and *Gagnon v. Scarpelli*.[3] In holding that due process *does* guarantee notice and a hearing in the revocation context, the Court renounced the privilege/right distinction espoused in *Escoe*:

> We turn, therefore, to the question whether the requirements of due process in general apply to parole revocations. As Mr. Justice Blackmun has written recently, 'this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.' *Graham v. Richardson*, 403 U.S. 365, 374, 91 S.Ct. 1848, 1853, 29 L.Ed.2d 534 (1971). Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.' *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L. Ed. 817 (1951) (Frankfurter, J., concurring), quoted in *Goldberg v. Kelly*, 397 U.S. 254, 263, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287 (1970).

Morrissey, 408 U.S. at 481; *accord Scarpelli*, 411 U.S. at 782 & n.4 (holding same due process protections apply to probation revocation as to parole revocation and noting, "It is clear at least after *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L. Ed. 2d 484 (1972), that a probationer can no longer be denied due process, in reliance on the dictum in *Escoe v. Zerbst*, 295 U.S. 490, 492, 55 S.Ct. 818, 819, 79 L. Ed. 1566 (1935), that probation is an 'act of grace.'"). Because revocation of both probation and

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[2] *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)

[3] *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).

parole constitutes a "grievous loss of liberty," some due process protections apply to these proceedings. *Morrissey*, 408 U.S. at 482; *Scarpelli*, 411 U.S. at 782; U.S. Const. amend. XIV.

These protections include a standard of proof that ensures revocation will be based on "verified facts," rather than merely reasonable belief. *Morrissey*, 408 U.S. at 484. Indeed, in *Morrissey*, the Court explained that reasonable belief, i.e. probable cause, is the appropriate standard for the *initial hearing*, *not* for the final revocation hearing:

> The first stage occurs when the parolee is arrested and detained, usually at the direction of his parole officer. The second occurs when parole is formally revoked. … [D]ue process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available. Such an inquiry should be seen as in the nature of a 'preliminary hearing' to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions.

Id. at 485. Later, the actual revocation hearing "must be the basis for *more than* determining probable cause; it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation." *Id.* at 488 (emphasis added).

Washington state has appropriately abandoned the pre-*Morrissey* standard of proof in certain other types of revocation proceedings. For

example, in community custody violation hearings, "[t]he department has the obligation of proving each of the allegations of violations by a preponderance of the evidence." WAC 137-104-050(14). The same is true for Drug Offender Sentencing Alternative ("DOSA") revocation hearings – even for individuals who are serving the in-custody portion of DOSA. *State v. McKay*, 127 Wn. App. 165, 168-69, 110 P.3d 856 (2005). The preponderance standard is necessary to meet the due process requirement that "a violation finding will be based on verified facts … and accurate knowledge." *Id.*

The *McKay* court recognized that after *Morrissey*, "[t]he assessment of what process is due depends upon the 'extent to which an individual will be condemned to suffer a grievous loss.'" *Id.* at 169 (quoting *Morrissey*, 408 U.S. at 481). The court noted that a defendant has "a significant liberty interest" in remaining on community custody. *Id.* at 170. Furthermore, the State also has an interest in ensuring that revocations are based on verified facts and accurate knowledge because the defendant's rehabilitation and reintegration into society serves not only the individual but also the community at large. *Id.* Thus, "[t]he proper standard of proof at DOSA revocations is a preponderance of the evidence." *Id.*

The same must be true for SSOSA revocations. The liberty interest at stake is at least as great in SSOSA revocation hearings as in DOSA revocation hearings. *Cf. Scarpelli*, 411 U.S. at 772 (holding there is no difference for due process purposes between parole revocation hearings and probation revocation hearings); *In re the Personal Restraint of McNeal*, 99 Wn. App. 617, 631-33, 994 P.2d 890 (2000) (liberty interest of individual on community custody is substantially similar to that of a person on parole; thus same due process protections must be applied at community custody revocation hearings), *disagreed with on other grounds by Grisby v. Herzog*, 190 Wn. App. 786, 362 P.3d 763 (2015). The State's interest in assuring accurate results is also just as great, because, as in the DOSA context, it is better for society if defendants finish treatment and contribute to the community.

The standard of proof matters in this case. The State alleged a single violation based on Mr. Novikoff's use of marijuana for a serious injury. Mr. Novikoff and the SSOSA treatment provider disagreed about his level of use and whether the necessary documents had been produced. Mr. Novikoff made significant progress over years of treatment before injuring his back, yet the trial court found he failed to make satisfactory progress by reviewing the final few months in isolation. The court only

"grudgingly" revoked the SOSSA. Had the court applied a preponderance standard, it may not have found unsatisfactory progress.

In sum, this Court should grant review to determine the appropriate standard of proof in SSOSA revocation hearings, because the requirements of due process have changed significantly since the "reasonably satisfied" standard was established in 1962. RAP 13.4(b)(3), (4).

2. This Court should grant review because the trial court wrongly believed it lacked discretion to impose a sanction short of revocation.

This Court should also grant review because the trial judge indicated he believed the only available sanction was revocation, when in fact, lesser sanctions were permitted (and are generally imposed in similar circumstances).

The Court of Appeals acknowledged that "portions of the court's oral comments can be read to suggest the court believed it had no legal option other than revocation[.]" Slip Op. at 4. But it averred that "the written ruling cleared up any confusion" and that "it is the trial court's written order that governs our analysis, not the court's oral comments." Slip Op. at 4.

This Court should disagree with the Court of Appeals. First, even the written ruling in this case does not show the court considered and rejected lesser sanctions. CP 120-27. Second, it is appropriate to review an

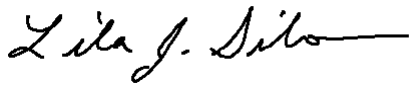
oral ruling when determining whether a judge wrongly believed he or she lacked discretion to impose a particular sanction. *See, e.g., State v. McFarland*, 189 Wn.2d 47, 55-56, 399 P.3d 1106 (2017) (remanding for resentencing where sentencing transcript revealed court erroneously believed it could not impose concurrent sentences, and that it might have done so had it recognized its discretion under the statute).

Here, the oral ruling indicates the court appreciated Mr. Novikoff's considerable progress and only "grudgingly" revoked the SSOSA based on a legal conclusion that "under *State v. Miller*[4] that is what I have available to me here." RP 222 (emphasis added). Because the court also had the discretion to impose 60-day jail sanctions, this Court should grant review and remand for the trial court to exercise its discretion.

F. CONCLUSION

For the reasons set forth above, Christopher Novikoff respectfully requests that this Court grant review.

DATED this 22nd day of March, 2018.



Lila J. Silverstein
WSBA #38394
Attorney for Petitioner

[4] *State v. Miller*, 180 Wn. App. 413, 325 P.3d 230 (2014).

APPENDIX A

FILED
MARCH 6, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 34704-4-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
CHRISTOPHER LLOYD NOVIKOFF,	)	
	)	
Appellant.	)	

PENNELL, J. — Christopher Novikoff appeals a trial court order revoking his special sex offender sentencing alternative (SSOSA) and imposing the terms of his suspended sentence. We affirm.

FACTS

Mr. Novikoff pleaded guilty to three counts of child molestation in the first degree, domestic violence. He received a SSOSA over the State's objection. Mr. Novikoff was sentenced to 130 months to life in prison with all but 12 months suspended. He was also placed on community custody. During the term of community custody, Mr. Novikoff was required, among other things, to "fully comply with any recommended treatment." Clerk's Papers at 40.

Mr. Novikoff did very well at first. However, after receiving prescription opioids for a back injury, Mr. Novikoff came into conflict with his community corrections officer (CCO) and therapist. Mr. Novikoff's therapist ultimately terminated him from treatment based on overuse of prescription medications and unauthorized use of marijuana. The State then filed a motion to revoke Mr. Novikoff's SSOSA.

The trial court held a revocation hearing and heard from Mr. Novikoff, two CCOs, and Mr. Novikoff's therapist. The therapist explained she was concerned about marijuana because Mr. Novikoff had been using marijuana at the time of his offense conduct. The therapist also agreed, somewhat reluctantly, to accept Mr. Novikoff back into treatment, but only under strict conditions, including no use of marijuana without proper monitoring. The CCOs generally testified to their belief that Mr. Novikoff was not taking his treatment seriously. Mr. Novikoff also testified and seemed reluctant to stop using marijuana. When asked if he was willing to stop using marijuana, Mr. Novikoff stated, "I don't see the point." Report of Proceedings (Aug. 31, 2016) at 199.

The trial court revoked Mr. Novikoff's SSOSA and imposed the original term of incarceration. In its oral comments, the court acknowledged that in some circumstances a SSOSA violation can be punished by 60 days' confinement. However, based on *State v. Miller*, 180 Wn. App. 413, 325 P.3d 230 (2014), the court stated if treatment is not

available, the only option is revocation. In its written findings and conclusions, the trial court noted Mr. Novikoff's therapist was willing to re-admit him to treatment. However, the court concluded Mr. Novikoff had failed to make satisfactory progress in treatment since May 2016, and he violated a condition of his SSOSA by not completing sex offender treatment. Mr. Novikoff appeals.[1]

ANALYSIS

Trial court's consideration of alternatives to revocation

A trial court's decision to revoke a SSOSA is reviewed for abuse of discretion. *State v. McCormick*, 166 Wn.2d 689, 705-06, 213 P.3d 32 (2009); *State v. Partee*, 141 Wn. App. 355, 361, 170 P.3d 60 (2007). A trial court abuses its discretion if it erroneously believes its options are limited and fails to consider other legally available possibilities. *Partee*, 141 Wn. App. at 361-62.

Both parties agree that trial courts may impose 60-day jail terms for SSOSA violations in lieu of revocation. *Id.* at 362-63; *State v. Badger*, 64 Wn. App. 904, 909-10, 827 P.3d 318 (1992). Mr. Novikoff argues the trial court mistakenly believed it did not

[1] Mr. Novikoff has filed a Statement of Additional Grounds (SAG). The SAG does not raise any new issues, beyond those discussed in counsel's briefs.

have this option here. The State contends the trial court was aware of its options and simply declined to impose an alternative to revocation. We agree with the State.

We begin by noting that it is the trial court's written order that governs our analysis, not the court's oral comments. *State v. Mallory*, 69 Wn.2d 532, 533-34, 419 P.2d 324 (1966). A court's oral comments or opinion "is no more than an expression of its informal opinion at the time it is rendered. It has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment." *Id*.

Although portions of the court's oral comments can be read to suggest the court believed it had no legal option other than revocation, the written ruling cleared up any confusion. In the written ruling, the court recognized that treatment was available to Mr. Novikoff. Nevertheless, the court opted for revocation, based on Mr. Novikoff's failure to make substantial progress in treatment. There was no legal error in the court's disposition.

Trial court's conclusion on no satisfactory progress

A court may revoke a SSOSA if it "*finds* that the offender is failing to make satisfactory progress in treatment." RCW 9.94A.670(11) (emphasis added). By the statute's plain terms, the issue of whether a defendant has made satisfactory progress in

treatment is a factual matter, left to the judgment of the trial court.[2] This delegation of authority makes good sense. Under the SSOSA statutory scheme, the trial court is the entity tasked with setting a defendant's SSOSA conditions and monitoring compliance. RCW 9.94A.670(4), (6), (8). It therefore stands to reason that the issue of whether a defendant has made "satisfactory progress" toward the court's treatment expectations is a matter best reserved for the trial court. We review this type of determination for abuse of discretion. *See, e.g.*, *McCormick*, 166 Wn.2d at 705-06.

The record shows no abuse of discretion. The evidence indicated Mr. Novikoff had regressed in treatment and was no longer responsive to recommendations made by his therapist and CCOs. Mr. Novikoff's dismissive attitude toward concerns raised about marijuana suggested he was at significant risk of reoffending. Although the trial court could have opted to give Mr. Novikoff a second chance, leniency was not required. Based on the record before the trial court, there was a sufficient basis to find Mr. Novikoff had not made satisfactory progress in treatment and that revocation was an appropriate consequence.

[2] The fact that the trial court included its ultimate finding regarding lack of satisfactory progress in the conclusions of law section of its order has no bearing on our analysis. *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986).

CONCLUSION

The order revoking Mr. Novikoff's SSOSA is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

WE CONCUR:

Korsmo, J.

Lawrence-Berrey, A.C.J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER NOVIKOFF, Petitioner.	)))))))))	COA NO. 34704-4-III

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