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SUPREME COURT NO. 99130-8

NO. 79574-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN WHEELER,

Petitioner.

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

The Honorable David Svaren, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Justin Wheeler asks this Court to grant review of the court of appeals' published decision in State v. Wheeler, No. 79574-1-I, filed September 8, 2020 (Appendix A). The court of appeals granted the State's motion to publish on September 29, 2020 (Appendix B).

B. ISSUE PRESENTED FOR REVIEW

The double jeopardy clauses of the Fifth Amendment and article I, section 9 of the Washington Constitution prohibit multiple punishments for the same offense. Is this Court's review warranted under RAP 13.4(b)(2), (3), and (4) to answer the single question of whether Wheeler was impermissibly subjected to multiple punishments for the same offense, where the trial court revoked Wheeler's SSOSA based in part on previous violations for which he had already been sanctioned?

C. STATEMENT OF THE CASE

In April 2009, when he was only 21 years old, Wheeler pleaded guilty to three counts of first degree child molestation. CP 8-16, 17-30. Wheeler felt "remorseful and very ashamed of what he did." CP 114. As is so often the case, Wheeler himself suffered physical and sexual abuse as a child. CP 113. With no prior criminal history, the victims' family supported Wheeler getting treatment rather than spending time in prison. CP 111-12.

The trial court sentenced Wheeler to 130 months, suspending all but 12 months of his sentence under the special sex offender sentencing alternative (SSOSA), RCW 9.94A.670. CP 21. The court ordered Wheeler to complete at least three years of outpatient sex offender treatment and imposed numerous community custody conditions. CP 21, 28-29. These conditions included (1) do not consume controlled substances; (2) participate in urinalyses (UAs); and (3) report to the assigned community corrections officer (CCO) as directed. CP 29.

Though the journey for Wheeler was longer than some, he successfully completed sex offender treatment, making "great strides" in creating "a whole new game plan for leading his life." CP 33-35, 43-45. For instance, Wheeler stopped drinking alcohol, took on a leadership role with his alcoholics anonymous (AA) group, and actively volunteers with his local church. CP 44. Wheeler also wrote letters of apology to the two victims, giving them an explanation and accepting full responsibility for his behavior. CP 36-41. Wheeler's treatment provider noted "[r]esearch has indicated there are helpful components of the healing process for the victim such as explanation and clarity." CP 35.

In April 2015, Wheeler admitted to six condition violations: contact with two minors (16- and 17-year-old girls), possessing alcohol, and failing to report for work crew three times. CP 46-47, 134-35. The court

sanctioned Wheeler to 60 days in jail for each violation, for a total of 360 days. CP 47. The court also ordered Wheeler to complete another two years of sex offender treatment and community custody. CP 47. In addition to the original conditions, the court imposed several new conditions, including (1) no access to the internet except as authorized by his CCO and (2) install monitoring software on any device with the internet. CP 48.

Wheeler's new treatment provider again noted Wheeler's progress. CP 53-54. Wheeler attended weekly group treatment sessions, with no unexcused absences. CP 53. He continued to accept full responsibility for his offenses, demonstrating empathy for his victims, as well as awareness of the emotional and psychological damage inflicted. CP 53. And, perhaps most importantly, "Mr. Wheeler continues to be a low risk to commit another sexual offense." CP 54.

In May 2016, the prosecution moved to revoke Wheeler's SSOSA based on several condition violations. CP 127-31. The court found four violations: failure to report to his CCO, failure to report to work crew, and consuming marijuana and Percocet without a valid prescription. CP 68-69. But the court refused to revoke Wheeler's SSOSA, instead sanctioning him to 60 days in jail for each violation, for a total of 240 days. CP 69.

In October of 2018, the prosecution again moved to revoke Wheeler's SSOSA, alleging several more condition violations. CP 72-78.

Specifically, the prosecution alleged Wheeler (1) failed to report to his CCO on September 13, 2018; (2) consumed marijuana on that same date; and (3) failed to install monitoring software on devices that could access the internet. CP 143-44.

The trial court held a revocation hearing on January 15, 2019. RP 2-3. The only witness was CCO Nancy Crawford, who sometimes met with Wheeler when his assigned CCO was unavailable. RP 8-9. Crawford testified Wheeler was supposed to call the DOC hotline every day, including September 13, to determine whether he needed to provide a UA. RP 9-11, 23. When Wheeler failed to call that day, he was directed to report in person the following day, September 14. RP 9.

Wheeler reported as directed on September 14 and admitted he forgot to call the previous day. RP 11. Wheeler did not appear to be under the influence. RP 25. When Crawford told Wheeler he needed to provide a UA that day, he further admitted to consuming marijuana the previous day. RP 11. Wheeler explained a friend had given him a bag of gummy bears and he grabbed a handful, not realizing they had marijuana in them. RP 11-13.

Crawford also testified Wheeler had failed to install internet monitoring software, Covenant Eyes, on his cellphone and computer. RP 13-16. Over the course of the summer, Wheeler had been reminded to install the monitoring software. RP 26-27. In August, however, Wheeler told his

CCO that he could not afford the software. RP 27. Crawford acknowledged Wheeler was unemployed at the time, with only sporadic "under the table" employment. RP 15, 27.

In closing argument, the prosecution emphasized Wheeler's prior violations and the trial court's prior sanctions. RP 34-38. Defense counsel objected, arguing the plain language of the statute and double jeopardy prohibited the court from relying on Wheeler's prior violations to revoke his SSOSA. RP 5-7, 34-35, 41-42; CP 79-87. Counsel explained, "The court does not have the ability or authority to sanction twice for the same violation. The Court can either revoke a SSOSA or can impose sanctions." RP 35. Counsel urged the court to, at most, impose jail sanctions rather than revoke Wheeler's SSOSA. RP 45.

The court agreed "any prior violations would not be admissible to prove that Mr. Wheeler violated on this particular occasion." RP 6. But, the court reasoned, "[p]rior violations may be relevant when it comes to the issue of any sanction that may be appropriate just as prior criminal history would be." RP 6. The court later reiterated, "a continuing course of conduct on a SSOSA with regard to violations is [relevant], the cumulative effect, to a determination of what is the appropriate sanction." RP 36.

The trial court found the three allegations to be violations of Wheeler's SSOSA, with the failure to install monitoring software being the most significant. RP 51; CP 93-94. The court reasoned:

> With regard to the prior sanctions and prior violation hearings held by the Court, I certainly do not suggest and would not punish Mr. Wheeler for the same conduct twice. However, there comes a time when the cumulative violations of a SSOSA, which is a matter of grace, not a matter of right, when the cumulative violations of the SSOSA suggest that the defendant should not remain upon a sexual, special sexual offender sentencing alternative. And the record in this file is replete with continued violations, and repeated hearings wherein violations have been found.

RP 52. Given the current violations "and in light of the prior violations," the trial court revoked Wheeler's SSOSA. RP 53; CP 93-94.

Wheeler appealed from his SSOSA revocation. CP 97. Wheeler argued, as he did below, that the trial court violated his right to be free from double jeopardy in relying on his previously sanctioned violations to revoke his SSOSA. Wheeler contended the plain language and structure of the SSOSA statutes indicate the legislature did not intend for individuals to receive multiple punishments for SSOSA violations. Br. of Appellant, 7-17; Reply Br., 1-6.

In an unpublished decision, the court of appeals recognized "Washington courts have not yet answered the specific question of whether double jeopardy prohibits a court from considering earlier SSOSA condition violations in its decision to revoke a SSOSA." Opinion, 5. The court

concluded it did not, relying broadly on prior decisions holding a sentencing court does not violate double jeopardy by enhancing an offender's sentence based on criminal history. Opinion, 5-7. The court further reasoned "revoking a SSOSA is not a separate punishment" and so there is no "double punishment" in this context. Opinion 5-6. Accordingly, the court held, "the trial court properly considered Wheeler's earlier condition violations when determining whether to revoke his SSOSA." Opinion, 8.

The State moved to publish. Corr. Motion to Publish, 1-2. The Stated emphasized "this issue is likely to arise again in future SSOSA revocation hearings," and noted another SSOSA revocation appeal had been stayed pending the outcome of Wheeler's case. Corr. Motion to Publish, 2. The State further noted prosecutors from several other counties "all urge publication of the opinion." Corr. Motion to Publish, 2.

The court of appeals granted the State's motion to publish, "finding that the opinion will be of precedential value." Appendix B.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court's review is warranted under RAP 13.4(b)(2), (3), and (4) to determine whether the legislature authorized sentencing courts to rely on previously sanctioned violations to revoke an individual's SSOSA.

Wheeler's case presents a single issue of first impression: whether the trial court violated Wheeler's right to be free from double jeopardy when

it revoked his SSOSA based in part on his previously sanctioned violations. By the prosecution's own acknowledgment, this issue is likely to occur again in future SSOSA revocations. Corr. Motion to Publish, 2. Definitive guidance from this Court is needed, warranting review under RAP 13.4(b)(2), (3), and (4).

The double jeopardy clause of the Fifth Amendment and article I, section 9 of the Washington Constitution provides three protections: (1) against a second prosecution for the same offense after acquittal; (2) against a second prosecution for the same offense after conviction; and (3) against multiple punishments for the same offense imposed in a single proceeding. State v. Miller, 159 Wn. App. 911, 923-24, 247 P.3d 457 (2011). It is the third protection at issue here.

In this context, "the interest the double jeopardy clause seeks to protect is 'limited to ensuring that the total punishment did not exceed that authorized by the legislature.'" Id. at 924 (quoting Jones v. Thomas, 491 U.S. 376, 381, 109 S. Ct. 2522, 105 L. Ed. 2d 322 (1989)). The ultimate question is therefore one of "statutory interpretation and legislative intent." State v. Villanueva-Gonzalez, 180 Wn.2d 975, 980, 329 P.3d 78 (2014) (quoting State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998) accord State v. Nguyen, 134 Wn. App. 863, 868, 142 P.3d 1117 (2006) ("[U]nless

the question involves the consequences of a prior trial, double jeopardy analysis is an inquiry into legislative intent.").

This is where the court of appeals opinion goes awry. The court of appeals reasoned that double jeopardy, generally, would not prohibit a trial court from considering previously sanctioned violations. Opinion, 5-8. For instance, the court explained, "[d]ouble jeopardy rights do not prohibit courts from considering criminal history for purposes of deciding an appropriate sentence or imposing sentencing enhancements, because that does not penalize the offender for that same earlier crime twice." Opinion, 6-7. Therefore, the court believed, "double jeopardy does not apply here either." Opinion, 7.

But the issue is not whether the double jeopardy clause, generally, precludes the legislature from authorizing such trial court action. Instead the question is solely one of legislative intent in this specific context: Did the legislature authorize the trial court to rely on previously sanctioned violations in revoking an individual's SSOSA? This question must be answered through statutory interpretation, rather than broad pronouncements on the principles of double jeopardy.

A trial court may revoke a SSOSA "and order execution of the sentence" only 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 9.94A.670(11). RCW 9.94A.633(2)(d) likewise specifies a SSOSA "may be revoked and the offender committed to serve the original sentence of confinement." But revocation is not the only sanction available for SSOSA condition violations. RCW 9.94A.633(1)(a) provides for another sanction: "An offender who violates any condition or requirement of a sentence may be sanctioned by the court with up to sixty days' confinement for each violation."

Washington courts have held these two statutes, RCW 9.94A.633 and RCW 9.94A.670, are "interrelated." State v. Badger, 64 Wn. App. 904, 910, 827 P.2d 318 (1992). RCW 9.94A.633 gives sentencing courts authority to impose up to 60 days in jail for each SSOSA violation, "in lieu of" revoking the SSOSA. State v. Partee, 141 Wn. App. 355, 361, 170 P.3d 60 (2007); Badger, 64 Wn. App. at 910. Put another way, "should an offender violate the terms of the sentence, the court has the power to *either* impose sanctions of up to 60 days' confinement pursuant to [RCW 9.94A.633] *or* to revoke the suspended sentence under the authority of [RCW 9.94A.670]." State v. Daniels, 73 Wn. App. 734, 736, 871 P.2d 634 (1994) (emphasis added).

Use of the present tense "violates" in both RCW 9.94A.670 and RCW 9.94A.633, also indicates the sanction, whether jail time or revocation, is to be imposed based on the current violation rather than on prior

violations. "A legislative body's use of a verb tense holds significance in construing statutes. The use of the present tense in a statute strongly suggests it does not extend to past actions." Crown W. Realty, LLC v. Pollution Control Hearings Bd., 7 Wn. App. 2d 710, 738, 435 P.3d 288 (citations omitted), review denied, 193 Wn.2d 1030 (2019).

The plain language of these two statutes, along with cases interpreting them, demonstrate sentencing courts have two mutually exclusive options when offenders violate the terms of their SSOSAs. The court may revoke the SSOSA and order the individual to serve the original sentence. Or, *in lieu of revocation*, the court may impose up to 60 days in jail for each violation. The choice is one or the other. This suggests the legislature did not intend to allow for sentencing courts to revoke a SSOSA based, in whole or in part, on previously punished violations.

Other language in the SSOSA statute bears this out. For instance, the revocation provision, RCW 9.94A.670(11), states "[a]ll confinement time served during the period of community custody shall be credited to the offender if the suspended sentence is revoked." This Court has held this provision does not apply to time spent on community custody, because the SSOSA statute makes a clear distinction between confinement and community custody. State v. Pannell, 173 Wn.2d 222, 229-30, 233-34, 267 P.3d 349 (2011).

The Sentencing Reform Act of 1981, chapter 9.94A RCW, defines "confinement" as "total or partial confinement." RCW 9.94A.030(8). "Total confinement" means "confinement inside the physical boundaries of a facility or institution operated or utilized under contract by the state or any other unit of government for twenty-four hours a day . . . ." RCW 9.94A.030(52). Time spent in county jail, served as a sanction for a SSOSA violation, is unquestionably "total confinement." RCW 9.94A.670(11) mandates that individuals receive credit for any confinement time served during a SSOSA. Miller, 159 Wn. App. at 927. Consistent with this, the trial court ordered Wheeler be given "credit for 7 days served in Cowlitz County on this case, and credit for all time served in the Skagit County Jail/Skagit County Community Corrections Center on this case subsequent to December 1, 2008." CP 94.

There are constitutional dimensions to requiring individuals on a SSOSA receive credit for all confinement time served. Miller, 159 Wn. App. at 928; see also State v. Phelan, 100 Wn.2d 508, 509, 671 P.2d 1212 (1983) ("[A]ll jail incarceration in connection with a charge must be credited against the maximum and any mandatory minimum prison sentences following conviction."). But it also reflects legislative intent.

Specifically, the legislature allowed individuals to be sanctioned for violating the conditions of their SSOSA. The sentencing court has two

options for sanctions: (1) revocation of the SSOSA or (2) up to 60 days of confinement. If the court chooses the latter, the individual receives credit for any confinement time served if his or her SSOSA is later revoked. In other words, the sanction is served and the punishment is final. This evinces the legislature's intent that individuals should not later have their SSOSA revoked based on prior violations that have already been sanctioned, i.e., multiple punishments for the same offense.

The trial court and the court of appeals both likened reliance on prior violations to reliance on criminal history at sentencing. RP 6; Opinion, 6-7. This comparison is inapposite. Several provisions of the SRA demonstrate the legislature clearly intended to increase punishment based on an individual's criminal history. Prior convictions are calculated in the individual's offender score, which then increases the standard sentence range for the current offense. RCW 9.94A.510 (sentencing grid), .515 (seriousness levels), .525 (offender score calculation), .530 (offender score and current offense seriousness "determines the standard range"). There is no corresponding legislative intent to allow for revocation of a SSOSA based on previously sanctioned violations.

State v. Buckley, 83 Wn. App. 707, 924 P.2d 40 (1996), provides a more apt analogy. There, Buckley, a juvenile, was found to be an "at-risk youth." Id. at 709. The court sanctioned Buckley with seven days' home

detention for violating a court order by leaving home. Id. at 709-10. The State later brought a criminal contempt charge against Buckley for the same violation, which resulted in a conviction. Id. at 710-11. The court held the contempt conviction violated double jeopardy. Id. at 714. Once the court sanctioned Buckley for leaving home, "it could not impose further punishment for that violation." Id. Her conviction was reversed. Id. Likewise, individuals cannot be sanctioned with jail time for SSOSA violations and then later have their SSOSA revoked based on the same violations.

At oral argument before the court of appeals, the prosecution agreed jeopardy attaches to sanctioned condition violations. Oral Argument, 13:10-13:50.[1] In other words, it would violate double jeopardy for the trial court to sanction an individual for a condition violation and then, at a later hearing, sanction the individual again for that same violation. Thus, contrary to the court of appeals decision, it is not "logical and fair" to interpret the SSOSA statute as allowing the trial court to rely on the same previously sanctioned violation to revoke an individual's SSOSA. Opinion, 8.

Division One's decision in Wheeler also appears to be in conflict with decisions by Division Two of the court of appeals, warranting review

[1] The recording is available at: https://www.courts.wa.gov/appellate_trial_courts/appellateDockets/index.cfm?fa=appellateDockets.showOralArgAudioList&courtId=a01&docketDate=20200729

under RAP 13.4(b)(2). The court of appeals repeatedly reasoned "revoking a SSOSA is not separate punishment." Opinion, 5; see also Opinion, 6 ("But, the revocation is not a second punishment"). By contrast, Division Two has held, "[s]imilar to the SSOSA revocation in [In re Personal Restraint of Wolf, 196 Wn. App. 496, 384 P.3d 591 (2016)], a DOSA [(drug offender sentencing alternative)] revocation is not a resentencing. Rather, it is one of the 'sanctions' the superior court can impose when an offender violates a condition of the DOSA sentence."[2] State v. Vandervort, 11 Wn. App. 2d 300, 303, 452 P.3d 1267 (2019). Thus, according to Division One, a SSOSA revocation is not a "second punishment," but according to Division Two, a SSOSA revocation is a "sanction." These two interpretations cannot be squared with one another.

At worst, the legislative intent, as disclosed via the plain language, is ambiguous. If the plain meaning of the statute is susceptible to more than one reasonable interpretation, courts may resort to principles of statutory construction, legislative history, and relevant case law in discerning legislative intent. State v. Reeves, 184 Wn. App. 154, 158, 336 P.3d 105 (2014). If this does not resolve the ambiguity, the rule of lenity requires the statute be interpreted in the defendant's favor. Id. Courts "will construe an

[2] Just like a SSOSA, the sentencing court can revoke a DOSA if the offender "violates the conditions or requirements of the sentence or if the offender is failing to make satisfactory progress in treatment." RCW 9.94A.660(7)(c).

ambiguous criminal statute against the defendant only where the principles of statutory construction clearly establish that the legislature intended such an interpretation." Id. Nothing in the relevant statutes indicates an intent to authorize double punishment for SSOSA violations. Thus, in the face of ambiguous statutory language, the rule of lenity precludes it.

In the absence of clear legislative intent to impose dual punishment, revocation based on previously sanctioned violations violates double jeopardy. The question before the sentencing court was whether Wheeler's *current* violations justified revocation. This Court should grant review to determine whether the sentencing court violated Wheeler's right to be free from double jeopardy when it relied on previously sanctioned violations to revoke his SSOSA.

E. CONCLUSION

Wheeler respectfully requests that this Court grant review, as this case presents a constitutional issue of first impression that is likely to recur and further creates conflict among published court of appeals decisions.

DATED this 20th day of October, 2020.

Respectfully submitted,

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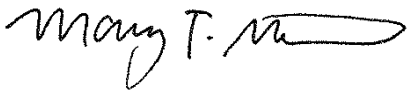

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Appendix A

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JUSTIN R. WHEELER, Appellant.	No. 79574-1-I DIVISION ONE UNPUBLISHED OPINION

LEACH, J. — Justin Ross Wheeler appeals the trial court's order revoking his special sex offender sentencing alternative (SSOSA). He claims the trial court violated his double jeopardy rights by considering his previously sanctioned condition violations when it revoked the SSOSA. He also claims, and the State concedes, that he should receive credit for time served on work crew.

Because the trial court's consideration of earlier violations does not violate double jeopardy, we affirm the SSOSA revocation. But, the SSOSA statute requires the court to credit confinement time, and confinement time includes work crew service. So, we remand to the trial court to credit Wheeler for time served on work crew.

FACTS

In December 2008, Justin Ross Wheeler pleaded guilty to three counts of first degree child molestation. The trial court sentenced him to a special sex offender

Citations and pincites are based on the Westlaw online version of the cited material.

sentencing alternative with a 130 month suspended sentence. The court ordered him to complete at least three years of outpatient sex offender treatment. The court also imposed community custody conditions, including (1) do not consume controlled substances; (2) do not contact minor children; (3) report to the assigned community corrections officer (CCO) as directed; and (4) participate in urinalyses as directed by the supervising CCO. In April 2015, Wheeler admitted to six community custody violations: contacting two minors, possessing alcohol, and failing to report for work crew three times.

The trial court ordered Wheeler to serve 360 days in jail as a sanction. It also ordered Wheeler to complete another two years of sex offender treatment, community custody, and imposed additional conditions, including: (1) prohibiting access to the internet, except as authorized by his CCO, and (2) requiring installation of monitoring software for any device with the internet.

In May 2016, the State asked the court to revoke Wheeler's SSOSA based on additional condition violations. The trial court found that he committed four violations because he failed to report to his CCO, failed to report to work crew, consumed marijuana, and consumed Percocet without a valid prescription. The court denied the State's request to revoke the SSOSA but sanctioned him with an additional 240 days in jail.

In October 2018, the State again asked the court to revoke Wheeler's SSOSA based on additional condition violations. The State alleged that he failed to report to his CCO, consumed marijuana, and failed to install monitoring software on devices that could access the internet.

On January 16, 2019, the trial court held a revocation hearing. During closing argument, the State mentioned Wheeler's earlier violations and sanctions. Wheeler objected, arguing that double jeopardy and the plain language of the SSOSA statute prohibited the trial court from considering Wheeler's earlier violations when deciding whether to revoke his SSOSA. The court found that while it could not rely on earlier violations as evidence that he "violated on this particular occasion," "[p]rior violations may be relevant when it comes to the issue of any sanction that may be appropriate just as prior criminal conduct would be."

The trial court found that Wheeler violated his SSOSA. The court found Wheeler's failure to install monitoring software as "the most significant violation." It revoked his SSOSA.

> With regard to the prior sanctions and prior violation hearings held by the Court, I certainly do not suggest and would not punish Mr. Wheeler for the same conduct twice. However, there comes a time when the cumulative violations of a SSOSA, which is a matter of grace, not a matter of right, when the cumulative violations of the SSOSA suggest that the defendant should not remain upon a sexual, special sexual offender sentencing alternative. And the record in this file is replete with continued violations, and repeated hearings wherein violations have been found.
>
> Given the very serious nature of the violation on this occasion where there had been a prior violation using electronic devices where Judge Rickert had specifically ordered that there's monitoring software and where there was no monitoring software, the Court will find, and in light of the prior violations, the Court will find that revocation is appropriate in this case and will order revocation of the special sexual offender sentencing alternative.

After revoking the SSOSA, the court ordered Wheeler serve his original sentence, 130 months on all three counts, to run concurrently with credit for time served in jail on prior condition violations. Wheeler appeals.

DISCUSSION

Wheeler claims the trial court violated the prohibition against double jeopardy by considering his earlier condition violations when it decided to revoke his SSOSA. We disagree.

The Sentencing Reform Act of 1981, chapter 9.94A RCW authorizes a sentencing court to suspend the sentence of a first-time sexual offender if the offender is shown to be amenable to treatment and instead require that the offender be released into community custody and receive outpatient or inpatient treatment.[1]

A trial court may revoke a SSOSA at any time if the offender violates the conditions of the suspended sentence or if the court finds the offender fails to make satisfactory progress in treatment.[2] After a court revokes a SSOSA, the court reinstates the original sentence.[3] Because revocation is not a criminal proceeding, the due process rights at a revocation hearing are not the same as those guaranteed at trial.[4] The offender at a revocation hearing has "only minimal due process rights."[5]

The double jeopardy clause of the Fifth Amendment guarantees protection against: (1) a second prosecution for the same offense after an acquittal; (2) a second prosecution for the same offense after a conviction; and (3) "'multiple punishments for

[1] RCW 9.94A.670.

[2] RCW 9.94A.670(11); State v. McCormick, 166 Wn.2d 689, 698, 705-06, 213 P.3d 32 (2009).

[3] State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999).

[4] Dahl, 139 Wn.2d at 683 (citing State v. Nelson, 103 Wn.2d 760, 763, 697 P.2d 579 (1985)).

[5] Dahl, 139 Wn.2d at 683 (citing State v. Badger, 64 Wn. App. 904, 907, 827 P.2d 318 (1992)).

the same offense' imposed in a single proceeding."[6] We review double jeopardy claims de novo.[7]

"In the multiple punishments context," double jeopardy protection is "'limited to ensuring that the total punishment did not exceed that authorized by the legislature.'"[8] "A double jeopardy violation does not occur simply because two adverse consequences stem from the same act."[9] Principles of double jeopardy generally do not apply to sentencing other than in the death penalty context.[10] Washington courts have not yet answered the specific question of whether double jeopardy prohibits a court from considering earlier SSOSA condition violations in its decision to revoke a SSOSA.

Wheeler claims that the SSOSA revocation is an additional penalty, and that considering earlier violations when deciding whether to revoke a SSOSA violates double jeopardy because the court already sanctioned him for those earlier violations. So, considering them would constitute a double punishment.

First, revoking a SSOSA is not separate punishment. If an offender violates a condition of a suspended sentence, or if the court finds that an offender fails to make satisfactory progress in treatment, the court can revoke the suspended sentence and apply the original sentence.[11] So, revoking the SSOSA does not impose a double

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[6] Jones v. Thomas, 491 U.S. 376, 381, 109 S. Ct. 2522, 105 L. Ed. 2d 322 (1989) (quoting North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989)).

[7] State v. Hughes, 166 Wn.2d 675, 681, 212 P.3d 558 (2009).

[8] Thomas, 491 U.S. at 381 (quoting U.S. v. Halper, 490 U.S. 435, 450, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989), abrogated by Hudson v. U.S., 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997)).

[9] Matter of Mayner, 107 Wn.2d 512, 521, 730 P.2d 1321 (1986).

[10] State v. Maestas, 124 Wn. App. 352, 357, 101 P.3d 426 (2004).

[11] RCW 9.94A.633(2)(d).

punishment.[12] The court does not add extra time to the original sentence when it revokes a SSOSA since the offender's original sentence is reinstated. Second, the trial court considered Wheeler's earlier SSOSA violations in determining whether to revoke his SSOSA and not in determining whether he committed the alleged new SSOSA violation. This is the same function that sentencing enhancements accomplish by considering criminal history for sentencing purposes, but not for determining guilt. So, the trial court did not "effectively [punish] Wheeler twice for prior violations," as he claims it did, but merely considered those earlier violations in assessing whether to revoke his SSOSA or impose a lessor sanction.

Wheeler's argument would require a court to always treat an offender as a first time offender regardless of the offender's history. The U.S. Supreme Court has already rejected the claim that harsher penalties imposed as a result of a prior conviction violate double jeopardy protections.[13] In McDonald v. Commonwealth of Massachusetts,[14] the court held that a prior conviction enhancement did not constitute a second punishment for the earlier offense, but rather the existence of the former conviction amplified the seriousness of the current offense thus justifying a more extreme sentence.[15]

Here too, the previous violations enhance the seriousness of the current violations thus supporting a SSOSA revocation. But, the revocation is not a second punishment. Double jeopardy rights do not prohibit courts from considering criminal history for purposes of deciding an appropriate sentence or imposing sentencing

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[12] In re Albrecht, 147 Wn.2d 1, 13, 51 P.3d 73 (2002).

[13] McDonald v. Commonwealth of Massachusetts, 180 U.S. 311, 21 S. Ct. 389, 45 L. Ed. 542 (1901).

[14] 180 U.S. at 311.

[15] Commonwealth of Massachusetts, 180 U.S. at 312; Chenowith v. Commonwealth, 12 S.W. 585, 11 Ky. L. Rptr. 561 (1889).

enhancements, because that does not penalize the offender for that same earlier crime twice. Instead, this consideration treats a repeat offense more seriously than a first offense with a more serious penalty. Similarly, double jeopardy does not apply here either.

Wheeler claims that we cannot analogize a SSOSA revocation to a sentencing enhancement because "there is no corresponding legislative intent to allow for revocation of a SSOSA based on previously sanctioned violations." But, the SSOSA statute does show a legislative intent that a court consider an offender's history. To be eligible for a SSOSA, the offender must have "no prior convictions."[16] If the court must consider an offender's conviction history before imposing a SSOSA, then it logically follows that the court can consider the offender's conduct history after receiving a SSOSA, including violations, when deciding whether to revoke a SSOSA. Also, prohibiting courts from considering earlier condition violations would frustrate the legislature's effort with the SSOSA statute to both protect children and promote rehabilitation.[17]

Wheeler also claims the two statutes authorizing punishment for condition violations suggest a legislative intent to prohibit sentencing courts from considering earlier violations when considering a SSOSA revocation, because the statutes offer "two mutually exclusive options when an individual violates" a SSOSA. He explains how if the court chooses to confine an offender but later revokes the SSOSA, the offender receives credit for confinement time. "In other words, the sanction is served and the punishment is final." But, "[n]either the history of sentencing practices, nor the pertinent

[16] RCW 9.94A.670(2)(b).
[17] State v. Flowers, 154 Wn. App. 462, 466, 225 P.3d 476 (2010).

rulings of [the] [Supreme] Court, nor even considerations of double jeopardy policy support the proposition that a criminal sentence, once pronounced, is to be accorded constitutional finality similar to that which attaches to jury's verdict of acquittal."[18] And again, under Wheeler's reasoning, double jeopardy would prohibit courts from considering earlier convictions for sentence enhancements, because there too the offender has served the sanction and the punishment is final. But, because sentence enhancements do not violate double jeopardy, Wheeler's claim fails.

Wheeler relies on State v. Buckley,[19] where the court punished a juvenile for the same offense during two separate court proceedings that resulted in two separate punishments. But here, the court did not punish Wheeler in two separate proceedings for the same past violation. The court merely considered the earlier condition violations in determining whether to revoke his SOSSA and reinstated his original sentence. Because the court did not punish Wheeler twice, Buckley does not support his position.

Consideration of earlier condition violations for SSOSA revocations not only withstands a double jeopardy challenge, but it is logical and fair. The logic lies in the "attempt to deter repeated criminal activity, while the fairness is obvious in the notion that a recidivist should receive a stiffer sentence than a first-time offender."[20] We hold the trial court properly considered Wheeler's earlier condition violations when determining whether to revoke his SSOSA.

[18] U.S. v. DiFrancesco, 449 U.S. 117, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980).
[19] 83 Wn. App. 707, 924 P.2d 40 (1996).
[20] Com. v. Arriaga, 422 Pa. Super. 52, 56, 618 A.2d 1011 (1993).

Credit for Time Served

Wheeler next claims, and the State concedes, that he should receive credit for the time served on work crew during his SSOSA.

RCW 9.94A.670(11) requires that "[a]ll confinement time served during the period of community custody shall be credited to the offender if the suspended sentence is revoked." "Confinement" includes both partial and total confinement.[21] Partial confinement includes work crew.[22]

The court sanctioned Wheeler for prior SSOSA violations and ordered him to serve on work crew multiple times. The sentencing court gave him credit for all jail time in the SSOSA revocation but omitted credit for work crew. We remand for the sentencing court to credit work crew time in the order.

CONCLUSION

We affirm in part and remand in part. Wheeler fails to show that double jeopardy prohibited the trial court from considering earlier condition violations when determining whether to revoke his SSOSA. But, because the SSOSA statute requires a credit for confinement, and confinement includes work crew service, and Wheeler's sentence did not provide credit for work crew service, we remand to the trial court to correct this omission.

Leach, J.

WE CONCUR:

Brown, J.

Appelwick, J.

[21] RCW 9.94A.030(8).
[22] RCW 9.94A.030(36).

Appendix B

FILED
9/29/2020
Court of Appeals
Division I
State of Washington

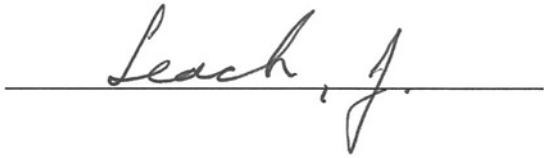
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. JUSTIN ROSS WHEELER, Appellant.	)	No.79574-1-I ORDER GRANTING MOTION TO PUBLISH OPINION

The respondent, State of Washington, having filed a motion to publish opinion and the hearing panel having considered the motion and finding that the opinion will be of precedential value; now, therefore it is hereby:

ORDERED that the unpublished opinion filed September 8, 2020, shall be published.

FOR THE COURT:



NIELSEN KOCH P.L.L.C.

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