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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CARL CHANEY,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DEBORAH FLECK

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED.

1. Whether this appeal should be dismissed as moot where this Court can provide no effective relief and the case presents no issue of substantial public interest.

2. Whether appellant has failed to establish a due process violation where he received notice of the three alleged sentence violations, the State disclosed the evidence against him, no hearsay was admitted at the hearing, and the court's finding was based on overwhelming and undisputed evidence.

B. STATEMENT OF THE CASE.

In 2000, Carl Chaney was convicted by jury trial of two counts of incest in the first degree based upon Chaney's sexual abuse of his teenage stepdaughter. CP 12.¹ The court initially imposed an exceptional sentence of 144 months of total confinement. CP 14. The convictions were affirmed on appeal, but the case was remanded for resentencing based on an offender score error. CP 21-22, 36. Upon resentencing, the court imposed

¹ Chaney was also convicted of two counts of child molestation in the third degree, but these convictions were vacated prior to sentencing because they were charged outside the statute of limitations. CP 22.

an exceptional sentence of 132 months of total confinement.

CP 40.

In addition to confinement, the court imposed 24 months of community placement and legal financial obligations. CP 39-40.

As a condition of community placement, the court ordered Chaney to complete a sexual deviancy evaluation within 30 days of being placed on supervision. CP 45. The court ordered that Chaney have no unsupervised contact with minors for 10 years. CP 40.

The judgment and sentence also notified Chaney of the requirement that he register as a sex offender. CP 47.

Chaney was released from prison on January 29, 2007.

CP 71. Over the next two years he repeatedly demonstrated his unwillingness to abide by the orders of the court and the directions of his Community Corrections Officer (CCO). On April 8, 2008, the court entered an Order Modifying Sentence and imposed 120 days of additional confinement based on Chaney's failure to pay legal financial obligations, failure to notify the Department of Corrections of his change of address, and failing to obtain a sexual deviancy evaluation. CP 62-63. On August 15, 2008, the court entered an Order Modifying Sentence and imposed 30 days of additional confinement based on Chaney's failure to take a polygraph

examination in May. CP 64-65. On November 14, 2008, the court entered an Order Modifying Sentence and imposing 120 days of additional confinement based on Chaney's failure to take a polygraph examination, failure to obtain a sexual deviancy evaluation, and traveling in restricted areas against the verbal directives of his CCO. CP 75-76.

On February 18, 2009, Chaney's CCO filed a Notice of Violation with the court. CP 83-84, 87-91. The report detailed three violations of the conditions of supervision. CP 84. The report listed the violations as follows:

- 1: Having contact with a minor, [E.C.], since 1/2/09.
- 2: Failing to pay toward Court ordered legal financial obligations since 1/2/09.
- 3: Failing to comply with Sex Offender Registration Requirements since on or about 1/8/09.

CP 84. In the report, as to the first violation, the CCO stated that Chaney had informed him that he had contacted E.C. by phone without permission. CP 87. As to the second violation, the CCO stated that Chaney was receiving \$428.00 per month in public assistance and had borrowed \$1200 from a family member and had made no payments toward his legal financial obligations since May of 2008. CP 88-89. As to the third violation, the CCO stated that Chaney had registered as homeless on January 5, 2009, and

registered a change of address on Pacific Highway on January 16, 2009. CP 89. However, GPS software reflected that Chaney began living at the Pacific Highway address on January 8, 2009, and thus did not report the change of address within 72 hours as required by law. CP 46, 89. The CCO concluded that Chaney's inability to follow the rules of supervision indicated that "he remains a very high risk to community safety." CP 90.

A hearing was held on March 5 and March 11, 2009.² Chaney represented himself with stand-by counsel. Chaney's CCO, Jeffrey Brown, was present and testified for the State. 1RP 11-28. Brown testified consistently with his report that Chaney admitted to him that he had contacted E.C., a minor, by phone without permission. 1RP 13. Chaney told Brown at the time that he only contacted E.C. once. 1RP 13. Brown also testified that he approved Chaney's move to the Federal Way Motel on January 8, 2009, and that Chaney did not register his new address with the sheriff for sex offender registration until January 16, 2009, although he had been directed that he needed to register immediately. 1RP 18-19; 2RP 36. Finally, Brown testified that Chaney had made no

² The Verbatim Report of Proceedings of March 5, 2009 is referenced herein as "1RP." The Verbatim Report of Proceedings of March 11, 2009 is referenced herein as "2RP."

payments toward his legal financial obligations since May of 2008, and was not diligently searching for work although he was able to work. 1RP 15-16; 2RP 12. When Chaney was arrested on February 11, 2009, he had a money order for \$1200 in his backpack. 1RP 17.

During CCO Brown's testimony, the State inquired as to his decision to have Chaney take a polygraph on February 4, 2009, in regard to his contact with E.C. 1RP 14. Chaney objected, stating that he wanted the opportunity to see the polygraph results and question the polygraph examiners.³ 1RP 14. The court overruled his objection. 1RP 14. The State did not elicit information from the polygraph examination, but asked Brown what action he took after the polygraph. 1RP 14. The exchange was as follows:

Q: And without going into what was said to you, did you receive information from the polygrapher?

A: I did.

Q: Okay, and did you end up violating Mr. Chaney for his contact with [E.], that you are aware of, after getting that information?

A: I did.

1RP 14. The State also asked Brown about statements that Chaney made to Brown on February 6 after the polygraph

³ The Notice of Violation report reflects that Chaney had polygraph examinations on February 4 and February 11, 2009. CP 87-88; 2RP 28.

examination. 1RP 19-20. The State did not elicit any information from the polygraph examination itself. 1RP 19-20. In the February 6 conversation with Brown, Chaney disclosed additional contact with E.C. 1RP 20. No other information regarding the polygraph examinations that occurred in February was elicited from Brown.

Chaney testified at the hearing. 2RP 16. He explained the circumstances surrounding his contact with E.C., but did not deny the contact. 2RP 17-19. He testified that he thought he was still considered homeless for registration purposes even though he had moved into a motel. 2RP 20. He testified that he borrowed \$1200 from a relative for motel rent and storage. 2RP 20.

On cross-examination, the State asked him about statements he made during the February polygraph examinations. 2RP 24-28. Chaney admitted that he told the polygraph examiner that he contacted E.C. twice, although he had told Brown that he only contacted her once. 2RP 25-26. Chaney admitted that he initially told the polygraph examiner that he had no physical contact with E.C., but subsequently acknowledged during the examination that he had had some physical contact with E.C. 2RP 26. Chaney was also asked about statements he made to the polygraph

examiner regarding contact with other minors. 2RP 27-28. Chaney admitted that he initially answered that he had no contact with minors, but changed his answer, explaining "it's impossible not to see any, where you ride the city bus. And we discussed all of those things." 2RP 27-28. In regard to the second polygraph, the State asked about statements that Chaney made regarding grooming behavior with someone seventeen or younger. 2RP 30. Chaney denied making statements to the polygraph examiner regarding a seventeen-year-old girl. 2RP 30-31. The State offered the polygraph reports "as to statements that Mr. Chaney made" for impeachment. 2RP 31.

The State argued that Chaney's changing answers during the polygraph examinations affected his credibility, and asked that the polygraph examinations be admitted. 2RP 29. Chaney objected and his objection was overruled. 2RP 30. In argument, the State argued that the court should consider the statements that Chaney made to the polygraph examiners. 2RP 41-42.

In making its decision, the court stated, "I have not received in evidence the polygraphs. I am not considering the polygraphs at this point in time, other than the questions and answers that [the prosecutor] asked, and you gave on the record." 2RP 47. The

court found that Chaney had committed the three violations at issue, and imposed 50 days of confinement. 2RP 50; CP 81-82.

The Department of Corrections terminated its supervision of Chaney on September 26, 2009, after he was terminated from sex offender treatment. Supp CP __ (sub 262). The superior court terminated its supervision of Chaney on October 29, 2009. Supp CP __ (sub 261, 262).

C. ARGUMENT.

1. NO DUE PROCESS VIOLATION OCCURRED AT THE HEARING, WHERE DEFENDANT WAS SANCTIONED FOR VIOLATIONS THAT WERE ESTABLISHED WITH UNDISPUTED EVIDENCE.

Chaney contends that his minimal due process rights were violated at the March 2009 sentence modification hearing. This contention is without merit. It is based on Chaney's assertion that the court considered polygraph examinations that constituted hearsay. However, the record reflects that the State only used the polygraph examinations to confront Chaney with statements he made during the examination, which do not constitute hearsay. The record is clear that the Court did not review the polygraph

examinations or consider them for any other purpose. As such, Chaney's claim of a due process violation should be rejected.

The due process rights afforded at sentence violation hearings are not the same as those afforded at trial. State v. Abd-Rahmaan, 154 Wn.2d 280, 289, 111 P.3d 1157 (2005); State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999). An offender has only minimal due process rights in a sentence violation hearing. Dahl, 139 Wn.2d at 683. These rights include written notice of the alleged violations, disclosure of the evidence against him, the opportunity to be heard, the right to confront and cross-examine witnesses (unless good cause is shown), a neutral hearing body, and a statement by the court as to the evidence relied on and the reasons for the imposition of sanctions. Id. An offender must object to a due process violation at the hearing, or else the violation is waived. State v. Robinson, 120 Wn. App. 294, 299-300, 85 P.3d 376 (2004).

Chaney contends that his right to notice and to disclosure of the evidence against him was violated because the polygraph reports were not provided to him prior to the hearing. However, Chaney received notice of the three sentence violations that were alleged: contact with a minor without permission, failure to properly

register his change of address, and failure to pay legal financial obligations. CP 84. The polygraph examinations were not presented as violations and the results of the examinations were never presented as evidence at the hearing. The only evidence from the polygraph examinations offered by the State at the hearing was statements that Chaney made during those polygraph examinations. These statements were outlined in the Notice of Violation report issued on February 18, 2009. CP 87, 88. As such, the record reflects that Chaney received ample notice of the alleged violations and the evidence against him.

Next Chaney contends that his due process rights were violated by admission of the polygraph examinations without the opportunity to confront the polygraph examiners. Hearsay evidence may be considered in lieu of live testimony only if there is good cause to forgo live testimony, such as difficulty of procuring witnesses. Dahl, 139 Wn.2d at 686. In the present case, no hearsay was elicited. The only evidence presented from the polygraphs was Chaney's own statements, which were elicited in cross-examination of Chaney. 2RP 25-29. A party's own statements offered against the party do not constitute hearsay pursuant to ER 801(d)(2)(i). Statements that Chaney made during

the polygraph examinations were not hearsay, and thus his right to confrontation was not violated by admission of these statements. State v. Badger, 64 Wn. App. 904, 908, 827 P.2d 318 (1992) (defendant's out-of-court statements contained in violation report not hearsay and admissible for substantive purposes pursuant to ER 801(d)(2)(i)).

Moreover, even if Chaney could establish some violation of his minimal due process rights, the error was harmless. Id. at 688. Due process requires that sanctions be based on verified facts and accurate knowledge of the defendant's behavior. Id. at 688. Here, the evidence was overwhelming and undisputed that Chaney had contacted E.C. without permission, had failed to register his new address within 72 hours, and had failed to make any effort to pay his legal financial obligations since May of 2008 despite having some financial resources and the ability to work. The court's finding that these violations occurred was based on evidence independent of the polygraph examinations. Thus, any error in regard to the polygraph examinations was undoubtedly harmless.

2. THIS APPEAL SHOULD BE DISMISSED AS MOOT.

Chaney's appeal should be dismissed as moot. This Court cannot provide any effective relief because Chaney has already completed the jail time imposed. Chaney is no longer being supervised by the Department of Corrections or the superior court. This case presents no new issue that needs an authoritative determination.

A case is moot when the court can no longer provide effective relief. State v. Abd-Rahmaan, 120 Wn. App. 284, 288, 84 P.3d 944 (2004), *reversed on other grounds*, 154 Wn.2d 280, 111 P.3d 1157 (2005). An appellate court will reach the merits of a moot appeal only if the case presents a matter of continuing and substantial public interest. Id. Three factors should be considered in making this determination: (1) whether the issue presented is public in nature, (2) whether an "authoritative determination is desirable to provide future guidance to public officers," and (3) whether the issue presented is likely to recur. Id. (quoting Hart v. Dept. of Soc. Health Services, 111 Wn.2d 445, 448, 759 P.2d 1206 (1988)).

In the present case, these factors do not favor reaching the merits. Issues involving sentence modification are public in nature. Id. However, this case does not present any issue that requires an authoritative determination. The State Supreme Court has already determined that minimal due process rights apply to sentence modification hearings, and that offender has the right to confront witnesses unless good cause is shown. Abd-Rahmaan, 154 Wn.2d at 289-90. In the present case, Chaney's minimal due process rights were not violated. He received notice of the alleged violations, the State disclosed the evidence against him, and no hearsay was admitted at the hearing. This case does not present an issue of continuing and substantial public interest. It should be dismissed as moot.

D. CONCLUSION.

This appeal should be dismissed as moot. In the alternative, the court's imposition of 50 days confinement, based on evidence

of sentence violations that was overwhelming and undisputed,
should be affirmed.

DATED this 3rd day of December, 2009.

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 Vanessa Lee, the 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. CHANEY, Cause No. 63231-1-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.

U Brame

Name

Done in Seattle, Washington

12/23/09

Date