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NO. 67935-0-1

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

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STATE OF WASHINGTON,

Respondent,

v.

DONALD L. HAND,

Appellant.

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BRIEF OF RESPONDENT

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## **I. ISSUES**

(1) When there is not court rule requiring that a defendant be notified of his right to appeal, does the court's failure to give such notice constitute "extraordinary circumstances" justifying an extension of time to file a notice of appeal under RAP 18.8(b)?

(2) The court found that the defendant had violated his conditions of sentence by (a) unauthorized contact with a minor and (b) possession of pornography. In revoking SSOSA, the court said that because of the defendant's prior history, it would revoke for any violation. Can this court conclude that the SSOSA would have been revoked solely for violation of the "no contact with minors" provision?

## **II. STATEMENT OF THE CASE**

On December 1, 1999, the defendant, Donald L. Hand, was found guilty at a stipulated trial of first degree rape of a child. On December 8, the court sentenced him to 123 months' confinement. Under the special sexual offender sentencing alternative (SSOSA), the court suspended this sentence on condition of 6 months' confinement. The court required the defendant to undergo 3 years of outpatient sex offender treatment. CP 190-81. Among other conditions, the court imposed the following:

3. Have no contact with minor children without the presence of an adult who is knowledgeable of the offense and has been approved by the supervising Community Corrections Officer.

...

6. Do not possess pornographic materials, as directed by the supervising Community Corrections Officer.

CP 186. This judgment was not appealed.

As part of his treatment conditions, the defendant was precluded from engaging in sexual activity without the approval of his therapist. He nonetheless engaged in a sexual relationship without approval. His treatment provider sanctioned him by requiring him to attend additional treatment sessions. CP 159.

The defendant later began a relationship with a different woman. His supervising community corrections officer (CCO) specifically reminded him about the prohibition on sexual activity. The defendant nonetheless again engaged in sex without approval from his therapist. CP 165-66. On September 11, 2002, the court entered an order extending treatment until "court releases him from that obligation." CP 154-56.

On August 23, 2005, the defendant was arrested for a domestic violence assault. CP 111. Prior to trial, the alleged victim moved to Mississippi. When she did not appear for trial, the case

was dismissed. The defendant told his treatment provider that the alleged victim had been “drunk and disrespectful.” CP 91.

In March, 2007, the treatment provider submitted a report that the defendant was “on track to complete program” The report stated that re-offense risk was low at that time. CP 76-78. On June 18, the court entered an order terminating treatment. CP 72-74.

On February 13, 2007, the defendant reported to his CCO for a scheduled polygraph. During the polygraph, the defendant said that he had been alone with a 4-month old child while his niece took a shower. He also admitted that he had “shuffled through” a *Playboy* magazine. The defendant also said that he still struggled with “impulses” towards underage girls. Cp 41-42.

The court requested a report from the defendant’s former treatment provider. The provider responded that he considered these to be “very serious violations.” The contact with the 4-month-old child and other incidents suggested “increasing access to minors.” CP \_\_\_\_ (Letter from Northwest Treatment Associates, docket no. 84, p. 1).<sup>1</sup>

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<sup>1</sup> The State is designating this document in a Supplemental Designation of Clerk’s Papers).

With regard to the defendant viewing *Playboy*, the report stated:

This was not awful; we are not sex negative here. For a pedophile to look briefly at adult mainstream pornography may actually improve his arousal to appropriate interaction. However, this was pornography and an approximation to pornography and it was kept secret until polygraph was administered. Likely this material was at least somewhat disinhibiting.

Id. at 2.

The provider concluded that the defendant's re-offense risk had risen from low to moderate. "Client smiles and glibly verbalizes awareness, contrition, and rededication to compliance and change, but the enabling character is engrained." The provider was "on the fence" about revocation. Id.

A revocation hearing was held on April 14, 2008. The defendant stipulated to both violations. Revocation RP 3. The court decided to revoke the SSOSA:

I'm going to follow the State's recommendation and revoke the SSOSA for the violations reported. I'm mostly troubled by the failure to disclose these things until faced with a stress of a polygraph examination as well as [the treatment provider's] report that his adjustment to supervision and treatment has never been good over the long run.

While I recognize that [the provider] is on the fence and willing to approve continued treatment if the Court so elects, my sense is that over time, while the

violations have not been as serious as I sometimes see in these cases, it seems that ever time we're back with an issue of pushing the envelope of what's acceptable or unacceptable with a SSOSA sentence. And I'm sure that I had made it clear on a prior occasion that by not revoking Mr. Hand at those times that I wouldn't be willing to allow him to continue on this extraordinary sentence if there were violations in the future. And I treat these as serious violations of the SSOSA sentence.

Revocation RP at 5-6.

The order revoking the SSOSA sentence was filed on April 28, 2008. CP 10-15. Over 3 ½ years later, on November 15, 2011, the defendant filed a notice of appeal from that revocation. CP 1. The defendant also filed a motion for extension of time to file the notice. The State filed a response opposing that motion. The court passed consideration of the motion to the panel that will hear the case on the merits.

### **III. ARGUMENT**

#### **A. WHEN A WARNING IS NOT REQUIRED BY COURT RULES, THE COURT'S FAILURE TO GIVE THAT WARNING IS NOT AN "EXTRAORDINARY CIRCUMSTANCE" JUSTIFYING AN EXTENSION OF TIME UNDER RAP 18.8(B).**

The appeal in this case was untimely by over 3½ years. The defendant filed a motion to extend time to file the notice of appeal. In support of this motion, he cited cases dealing with waiver of the constitutional right to appeal. In response, the State argued that

there is no constitutional right to appeal an order revoking probation. The court has not yet ruled on the motion.

The constitutional issues are adequately discussed in the States' Response to Motion to Enlarge Time. These arguments will not be repeated here. In the defendant's Reply to that response, however, he raised a new argument: that an extension is warranted under RAP 18.8(b). The State has not previously addressed this argument.

RAP 18.8(b) allows extension of time under very limited circumstances:

The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal. . . The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section.

This rule applies in criminal cases when the constitutional right to appeal is not involved. For example, it governs belated petitions for review of decisions affirming criminal convictions. Shumway v. Payne, 136 Wn.2d 383, 392-93, 964 P.2d 349 (1998).

The concept of "extraordinary circumstances" is a narrow one:

“Extraordinary circumstances” include instances where the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party’s control. The standard set forth in the rule is rarely satisfied.

Id. at 395 (citations omitted).

Under RAP 18.8(b), mistakes made by counsel do not justify extending the time to file a notice of appeal. See Schaeferco, Inc. v. Columbia River Gorge Comm’n, 121 Wn.2d 366, 349 P.2d 1225 (1993) (counsel’s error in failing to serve opposing party with motion for reconsideration). In one case, for example, a multi-million dollar judgment was entered against the State. The plaintiffs noted the judgment for presentation. They gave proper notice of this presentation, but no one appeared for the State. The State did not receive notice of the entry of the judgment until after the time for appeal had lapsed. In seeking an extension of time, the State claimed that the Assistant Attorney General assigned to the case had *intentionally* failed to respond to the notice of presentation. Even assuming that this was true, this court held that there were no “extraordinary circumstances” justifying an extension of time to file a notice of appeal. Beckman v. DSHS, 102 Wn. App. 687, 695-96, 11 P.3d 313 (2000).

In Beckman, the appealing party received no notice of the appeal deadline. It was not even aware that the judgment had been entered. Nonetheless, the court refused to grant a 10-day extension of time to file an appeal of a multi-million dollar judgment. It is thus clear that a court's failure to advise a party of appellate deadlines is not a basis for an extension of time under RAP 18.8(b).

As his sole authority to the contrary, the defendant cites Seattle v. Braggs, 41 Wn. App. 546, 705 P.2d 303 (1985). That case involved an appeal to Superior Court of a decision of a court of limited jurisdiction. RALJ 2.7 requires courts of limited jurisdiction to advise defendants of their right to appeal. The municipal court had failed to comply with this rule. This court held that that failure justified extending the time to file a notice of appeal:

To ensure that a defendant's appellate rights are adequately protected, the record should clearly indicate that the trial court advised the defendant pursuant to RALJ 2.7 of the right to appeal a conviction as well as the time and method for commencing an appeal. Where the record does not so clearly indicate and the appeal notice was untimely filed, compelling circumstances will be found to necessitate extending the appeal notice filing period so that the defendant is not unjustly deprived of the right of appeal.

Braggs, 41 Wn. App. at 651.

Braggs sheds no light on the issues in the present case, for two reasons. First, Braggs does not involve RAP 18.8(b). That rule does not apply to appeals heard by the Superior Court. See RAP 1.1 (Scope of Rules). Nor does Bragg use the same test. Under RAP 18.8(b), extensions are limited to “extraordinary circumstances.” In Braggs, the court said that extensions could be granted for “*compelling* or extraordinary circumstances.” Braggs, 41 Wn. App. at 649 (emphasis added). The lack of notice was held to be a “compelling circumstance,” not an “extraordinary circumstance.” In light of the case law defining “extraordinary circumstances,” it is clear that the two terms are not synonymous.

Second, the basis for finding “compelling circumstances” was the trial court’s failure to comply with a court rule requiring notice of the right to appeal. There is no such requirement for probation revocation proceedings. See CrR 7.6 (setting out procedural requirements for probation revocation). In the present case, the trial court fully complied with court rules. Its failure to create new procedural protections cannot be considered an “extraordinary circumstance.”

The standard urged by the defendant would open a large number of decisions to untimely attack. Since no rule requires

notification of the right to appeal in probation revocation proceedings, it is unlikely that many courts have given such notification. Thus, most decisions revoking probation could be appealed, even years after they were entered.

But the consequences of this standard would not stop there. When the constitutional right of appeal is not involved, the rules governing appeal in civil cases are the same as those in criminal cases. Under RAP 2.2(a)(1), final judgments in civil cases are appealable as a matter of right. Under CR 58, there is no requirement that parties be informed of their right to appeal. If lack of such notice justifies a belated appeal, then most civil judgments as well could be appealed years after they were entered.

In short, the defendant's argument is inconsistent with Shumway and Beckman. The defendant's alleged ignorance of his right to appeal does not justify extending the time for him to do so. As the appeal is untimely, it should be dismissed.

**B. THE TRIAL COURT'S DECISION TO REVOKE SSOSA IS ADEQUATELY SUPPORTED BY THE DEFENDANT'S IMPROPER CONTACT WITH MINORS.**

On the merits of the case, the defendant claims that the "possession of pornography" condition was unconstitutionally vague. Under a Supreme Court decision handed down several

months after probation was revoked, the State agrees that it was. State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008).

That violation was not, however, the sole basis for revoking the SSOSA sentence. The defendant was also found to have violated a condition prohibiting unauthorized contact with minors. CP 10. No challenge to this finding has been raised. This court must therefore determine the appropriate remedy when a revocation of probation has been based on both valid and invalid grounds.

Similar issues have arisen in the context of sentencing. In some cases, courts have imposed exceptional sentences on the basis of both valid and invalid factors. Such sentences will be upheld if the reviewing court is satisfied that the trial court would have imposed the same sentence based solely on a valid factor. State v. Cardenas, 129 Wn.2d 1, 12, 914 P.2d 57 (1986).

The same reasoning should apply in the context of a SSOSA revocation. The decision to revoke a SSOSA sentence rests within the sound discretion of the trial court. Revocation is justified if there is sufficient proof to reasonably satisfy the court that the probationer has violated a condition of the sentence. State v. McCormick, 166 Wn.2d 689, 705-06 ¶ 31, 213 P.3d 32 (2009). So

long as there is evidence of any one violation, probation can be properly revoked. Accordingly, if a reviewing court can determine that the probation would have been revoked for any single violation, there is no need to waste judicial time with further proceedings.

In cases involving probation revocation, courts have applied an analysis similar to that of Cardenas. In one case, for example, the trial court revoked probation based on both a new robbery conviction and other violations. On appeal, the court reversed the robbery conviction. It then considered the effect of this reversal on the probation revocation. It found that the record was “unclear as to the precise reason or reasons why the trial court revoked [the defendant’s] probation.” It therefore remanded the case “for specific findings as to the basis for the trial court’s ruling.” State v. Dowell, 26 Wn. App. 629, 632, 613 P.2d 197, review denied, 94 Wn.2d 1018 (1980).

The Supreme Court applied a similar analysis in State v. Dahl, 139 Wn.2d 678, 990 P.2d 396 (1999). There, the defendant was charged with multiple violations of probation, including an act of indecent exposure. That act was proved by hearsay evidence. The Supreme Court held that under the circumstance of that case, the use of hearsay was a due process violation. Id. at 687.

The court then considered the effect of this hearsay on the revocation decision. The trial court had not explained the importance of the different violations in her decision to revoke probation:

Because the judge's rationale is vague, it is difficult to tell what weight she placed on the hearsay evidence of [the defendant's] exposure to the two girls. However, the gravity of the incident and the fact that the judge specifically mentioned the allegation in her oral ruling indicates that the incident did influence the court's decision to revoke [the defendant's] SSOSA.

Because the revocation appears to have been based, at least in part, on consideration of the exposure incident, the due process error was not harmless.

Id. at 689.

Thus, both Dowell and Dahl are cases in which the appellate court could not determine the effect of the erroneous factor on the trial court's decision. Under such circumstances, the case must be remanded for clarification of the basis for revocation. If, on the other hand, the record does indicate that the trial court's decision would have been the same absent the improper factor, there is no need for remand.

In the present case, the court made it clear that it was prepared to revoke SSOSA for *any* violation. The court also made it clear that it considered *both* violations to be serious. Revocation

RP 6. Indeed, the record suggests that the violation involving contact with minors was *more* serious, since it directly placed minors at risk. On this record, there is no reason to believe that the trial court would have made a different decision if it had only considered the violation involving contact with minors. Consequently, there is no need for further consideration by the trial court.

#### **IV. CONCLUSION**

The appeal should be dismissed as untimely. Alternatively, the order of revocation should be affirmed. If this court believes that the record is insufficient to support affirmance, the case should be remanded for clarification of the trial court's reasons for revoking probation.

Respectfully submitted on July 27, 2012.

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IN THE COURT OF APPEALS  
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THE STATE OF WASHINGTON,

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AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 27<sup>th</sup> day of July, 2012, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I  
ONE UNION SQUARE BUILDING  
600 UNIVERSITY STREET  
SEATTLE, WA 98101-4170

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containing an original and one copy to the Court of Appeals, and one copy to the attorney for the Appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

2012 JUL 30 9:02 AM 2:07

COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION I



Signed at the Snohomish County Prosecutor's Office this 27<sup>th</sup> day of July, 2012.

A handwritten signature in black ink, appearing to read 'Diane K. Kremenich', written over a horizontal line. The signature is stylized and cursive.

DIANE K. KREMENICH  
Legal Assistant/Appeals Unit