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August 20, 2015
Court of Appeals
Division I
State of Washington

COURT OF APPEALS NO. 73301-0-I

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

STATE OF WASHINGTON,

Respondent,

V.

SALLYEA McCLINTON,

Appellant.

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

The Honorable Palmer Robinson, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court's admission and reliance on hearsay to modify Sallyea McClinton's sentence without a showing of good cause violated McClinton's right to due process under the Fourteenth Amendment.

Issue Pertaining to Assignment of Error

The state moved to modify McClinton's sentence on grounds he: failed to register with the sheriff's office; and failed to obtain prior approval for his living arrangements. As proof of the former allegation, the state offered the testimony of McClinton's CCO who testified "that staff from the registration office" told him McClinton failed to register. 2RP 10. As proof of the latter, the state also offered the testimony of McClinton's CCO who testified McClinton told him he was staying at the Union Gospel Mission, but McClinton's mother said he had been staying with her. 2RP 13.

Where there is no showing on the record that it would be difficult to procure the testimony of live witnesses or any showing that the out-of-court statements admitted and relied upon were demonstrably reliable, did the court's admission and reliance on this hearsay evidence violate McClinton's due process rights under the Fourteenth Amendment?

B. STATEMENT OF THE CASE

Following a jury trial in July 1997, appellant Sallyea McClinton was convicted of first degree rape while armed with a deadly weapon, attempted rape in the first degree and first degree burglary. CP 12-19. Count one allegedly occurred on September 18, 1995; counts two and three allegedly occurred on October 17, 1995. CP 12.

At sentencing on August 15, 1997, the court imposed 134 months on count one, 68 months on count two and 42 months on count three. The sentences imposed for counts one and two were ordered to run consecutively, and the 24-month enhancement was ordered to run consecutively to that, for a total sentence of 226 months (approximately 19 years). CP 14.

The court imposed community placement for the maximum period of time authorized by law. CP 14. In 1995, the date of McClinton's offenses, the applicable period of community placement was two years or up to the period of earned early release, whichever is longer. RCW 9.94A.120(9) (1995); Laws of 1995, ch. 108, § 3, eff. April 19, 1995.

The court imposed the following mandatory conditions, including:

(1) Report to and be available for contact with the assigned community corrections officer as directed;

...

(6) Receive prior approval for living arrangements and residence location[.]

CP 15; RCW 9.94A.120(9) (1995); Laws of 1995, ch. 108, § 3, eff. April 19, 1995.

The court also imposed the following non-mandatory conditions:

13. Do not use or possess illegal or controlled substances without the written prescription of a licensed physician and to verify compliance, submit to testing and reasonable searches of your person, residence and vehicle.^[1]

14. Do not purchase, possess or use alcohol (beverage or medicinal), and submit to testing and reasonable searches of your person, residence, property and vehicle by the Community Corrections Officer to monitor compliance.

...

¹ In State v. Riles, The Supreme Court held a 1997 amendment to former RCW 9.94A.120 clarified and confirmed the court's pre-existing authority to order affirmative acts, such as polygraph testing, to monitor compliance with sentencing conditions. State v. Riles, 135 Wn.2d 326, 342-43, 957 P.2d 655 (1998), abrogated on other grounds by State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010).

16. Do not change residence without the approval of your Community Corrections Officer.^[2]

CP 19; RCW 9.94A.120(9) (1995); Laws of 1995, ch. 108, § 3, eff. April 19, 1995. McClinton was also ordered to register as a sex offender. CP 14, 18.

On June 25, 2013, McClinton was released from custody to serve his period of community placement. Supp. CP ___ (sub. no. 208, Court – Notice of Violation, 9/9/13).

McClinton was returned to custody on January 15, 2015, after a bench warrant issued for allegedly violating conditions of community placement. Supp. CP ___ (sub. no. 255, Order for Bench Warrant, 12/19/14); 1RP 7.

The violation hearing was originally scheduled for February 4, 2015 (“1RP”). At the hearing, McClinton’s counsel Josephine Wiggs-Martin – who had filed a notice of appearance on January 27, 2015 – presented McClinton’s pro se motions to discharge her as counsel and to recuse the Honorable Palmer Robinson. CP 73-75; 1RP 3-4.

² This condition appears to be the same as the mandatory condition of obtaining prior approval for residence location and living arrangements during the period of community custody. RCW 9.94A.120(9)(b)(iv) (1995), supra.

Regarding the motion to discharge counsel, McClinton asserted Wiggs-Martin was unprepared for the hearing. 1RP 6. McClinton had been provided with a copy of the violation report only the evening preceding the hearing. 1RP 6-7. The prosecutor responded that Wiggs-Martin had a copy of the violation report and was aware of the violations.³ 1RP 6. The court denied the motion to discharge counsel. 1RP 7.

Regarding the motion to recuse, McClinton was concerned that because a prior modification of McClinton's judgment and sentence entered by Judge Robinson was pending before this Court, that Robinson could not be fair. 1RP 8. The court did not have an independent recollection of the prior modification and denied the motion to recuse. 1RP 10.

Following these rulings, Wiggs-Martin moved for a continuance. 1RP 10. As McClinton asserted, she had provided him with a copy of the violation report only the preceding evening. 1RP 10. Given that McClinton faced a significant period of incarceration if the court found the violations proven, Wiggs-Martin sought additional time to consult with McClinton about the

³ It does not appear a copy of the violation report was ever filed, however.

allegations. 1RP 11. The court granted a continuance until February 19, 2015. 1RP 11-12.

On February 19, 2015 ("2RP"), the state called community corrections officer (CCO) John Chinn as its only witness. 2RP 2-3. Chinn testified he was McClinton's CCO and the author of a violation report filed December 19, 2014, alleging 5 violations. 2RP 4.

Chinn testified McClinton reported to his office on December 4, 2014, following his release from jail on December 3 for a prior sentence modification. 2RP 5. The two discussed McClinton's reporting schedule. 2RP 6. They also discussed McClinton's living arrangements. 2RP 6. McClinton indicated he was residing at the Union Gospel Mission on the Second Avenue Extension in Seattle. 2RP 6. Chinn asked if McClinton had registered with the sheriff's office yet. 2RP 6. McClinton indicated he had not. 2RP 6.

Chinn wished to facilitate immediate contact with McClinton if the need arose. 2RP 6-7. Accordingly, he took McClinton down to the Union Gospel Mission so that McClinton could point out the doors he entered and the area of the building in which he typically would reside. 2RP 7. Chinn testified he told McClinton he could not stay elsewhere without Chinn's approval. 2RP 6-7.

Because they were near the King county sex offender registration office, Chinn intended to go inside with McClinton and get him registered. 2RP 7. According to Chinn, however, “the traffic and parking were such that it just didn’t permit.” 2RP 7. Chinn testified he: “let him off on the street of the door and I watched him go inside.” 2RP 7.

Chinn testified McClinton reported as directed on December 8 and December 10. 2RP 10. On December 10, Chinn reportedly told McClinton “that staff from the registration office had advised me that McClinton had failed to register on 2-4 – [.]” 2RP 10. Chinn “had trouble making sense out of it because [he] saw him go in[.]” 2RP 10.

Chinn directed McClinton to register and report to him the following day on December 11, to verify.⁴ 2RP 11. Since McClinton was a “weekly reporter,” Chinn directed him to report next on his regularly scheduled date of December 16. 2RP 11.

According to Chinn, McClinton did not report on the 11th to verify registration; nor did he report on December 16. 2RP 11.

Chinn testified he filed a violation report alleging the following 5 violations:

- (1) Failure to register as a sex offender on December 4;
- (2) Failure to report on December 11, 2014;
- (3) Failure to report on December 16, 2014;
- (4) Failure to be available for urine and breathalyzer testing since December 11;
- (5) Failure to obtain prior approval for living arrangements on or about December 10, 2014.

2RP 9-12.

Regarding alleged violation 4, Chinn testified he went “over that requirement with him” and he had no idea of McClinton’s whereabouts since his failure to report on December 11. 2RP 12. Nonetheless, Chinn had not directed McClinton to provide a urine sample when he reported on December 4, 8 or 10. 2RP 19-20. Nor did Chinn tell McClinton on December 10 he would be required to submit to testing on December 16. 2RP 20.

Regarding alleged violation 5, Chinn testified that on December 16, after McClinton failed to report, Chinn contacted McClinton’s mother. 2RP 13. According to Chinn, McClinton’s mother said “he had recently spent several nights at her residence, but that he had left – [.]” 2RP 13. Defense counsel objected to testimony as to what McClinton’s mother reportedly said, but was

⁴ Chinn testified it would have been okay if McClinton phoned, rather than reported in person. 2RP 24.

overruled. 2RP 13. Chinn continued that McClinton's mother said she had not seen him since December 12th. 2RP 13.

Chinn acknowledged that the Union Gospel Mission provides emergency nightly shelter and does not always have bed space for everyone who needs it. 2RP 21. And significantly, Chinn did not check the Mission's logs to verify if McClinton had been there. But he claimed "partners in his office did."

Personally, I did not. But a couple of my partners in my office did. They visited the Union Gospel Mission and they asked staff – they looked at the logs and there was no record of Mr. McClinton there over the days that they asked about.

2RP 21.

Chinn said his partners were "CCO (Hugh) and CCO Shelly Larkin." 2RP 21. When asked why he did not go personally to see the logs, Chinn testified:

Well, we generally work together as a team, and I knew that they were going to be down in that area, and I asked they could visit the Union Gospel Mission, and then I also asked if they could take a look around the block and look in the Starbucks where I was aware that he had told me that he might likely be in the morning when leaving the shelter.

2RP 22.

Following Chin's testimony, the court recessed and reconvened for argument on March 3, 2015 ("3RP"). 2RP 33; 3RP

3. McClinton argued the state failed to prove each of the alleged violations. 3RP 5. With respect to his alleged failure to register, Wiggs-Martin argued the state's evidence was insufficient as it was based on hearsay:

[T]he basis for the State's request that the Court find a failure to register is hearsay testimony from CCO Chinn about a conversation that he said he had with some person from the King County Sheriff's Office. And we would take issue with the Court finding that violation based solely on what is hearsay testimony. There wasn't a person here from the King County Sheriff's Office to offer testimony to this court about whether or not Mr. McClinton did in fact register on December 4. It is entirely possible that the person that CCO Chinn spoke with was mistaken. We don't have any sort of detailed accounting of what the nature and substance of that conversation was. And in any event, it is hearsay and I don't believe it is appropriate for the Court to make a finding solely based upon hearsay. Obviously, the rules of evidence are relaxed, but where the Court asks the Court to – excuse me – where the State asks the Court to make a finding solely on hearsay, nothing else – and the State certainly could have provided someone from the King County Sheriff's Office to provide some more direct evidence about whether or not Mr. McClinton did or did not register – we would ask the Court to find that there is – that the State has not met the threshold evidentiary standard with respect to Violation No. 1.

3RP 5-6.

Despite counsel's objection, the court ruled it would find McClinton failed to register based on what it acknowledged was clearly hearsay:

I don't know that I would agree – I think Evidence Rule 1101 provides – you know, whether you say it is relaxed or the evidence rules don't apply to this kind of proceeding, there isn't any – at the very least, they are relaxed, and maybe they are not applicable other than, I suppose, some due process and fairness. But certainly it is true that the testimony about Violation 1 in terms of Mr. McClinton's failure to register is hearsay, but I think that I certainly can and am going to consider it. And I consider the testimony of Mr. Chinn, which is that he actually drove him to the door and let him out, and saw him come in the building, and check later, and Mr. McClinton had not registered. I find that violation occurred.

3RP 9-10.

The court also relied on hearsay statements of McClinton's mother in finding McClinton failed to seek prior approval for his living arrangements:

And Violation 5, certainly – I mean, it is true that having a bed at the Union Gospel Mission every night is not a for sure thing, but Mr. Chinn testified that he had specifically talked to Mr. McClinton about giving him his cell phone number and told him to call him if he had problems. It – Mr. McClinton didn't stay at the Union Gospel Mission. Did stay at his – being Mr. McClinton's – mother according to her. And Mr. Chinn testified that had Mr. McClinton talked to him about it, he likely would have approved but he didn't know about it until after Mr. McClinton had left his mother's house and she didn't – or said she didn't

know where he was. So I find Violation 5 has been proved by a preponderance of the evidence as well.

3RP 11.

In sum, the court found all 5 alleged violations proven and imposed 60 days for each, to be served, consecutively, for a total of 300 days. CP 76-77; 3RP 12. This appeal follows. CP 78-80.

B. ARGUMENT

THE COURT'S RELIANCE ON HEARSAY TO MODIFY McCLINTON'S SENTENCE WITHOUT A SHOWING OF GOOD CAUSE OR RELIABILITY VIOLATED McCLINTON'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

The Due Process Clause of the Fourteenth Amendment applies to sentence modification hearings. Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972); State v. Abd-Rahmaan, 154 Wn.2d 280, 111 P.3d 1157 (2005); State v. Dahl, 139 Wn.2d 678, 990 P.2d 396 (1999). A probationer facing sentencing modification is entitled to minimal due process rights. Abd-Rahmaan, 154 Wn.2d at 284, 288-89; Morrissey, 408 U.S. at 480.

The following minimum due process protections are required in a parole revocation hearing:

- (a) written notice of the claimed violations of parole;
- (b) disclosure to the parolee of the evidence against

him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) *the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)*; (e) a “neutral and detached” hearing body; and (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking parole.

Abd-Rahmaan, 154 Wn.2d at 285-86 (adding emphasis, citing Morrissey, 408 U.S. at 489). A probationer facing sentencing modification enjoys the same due process protections. Abd-Rahmaan, 154 Wn.2d at 288-89).

The minimal due process right to confront and cross-examine witnesses is not absolute. Dahl, 139 Wn.2d at 686. Courts have limited the right to confrontation afforded during revocation proceedings by admitting substitutes for live testimony, such as reports, affidavits and documentary evidence. State v. Nelson, 103 Wn.2d 760, 764, 697 P.2d 579 (1985). However, hearsay evidence should be considered only if there is good cause to forgo live testimony. Nelson, 103 Wn.2d at 765. “Good cause has thus far been defined in terms of the difficulty and expense of procuring witnesses in combination with ‘demonstrably reliable’ or ‘clearly reliable’ evidence.” Abd-Rahmaan, 154 Wn.2d at 290 (quoting Nelson, 103 Wn.2d at 765).

The modification court here made no record to support a conclusion that there was good cause to admit the hearsay evidence relied upon in this case. The modification of McClinton's sentence is invalid to the extent the court relied on hearsay evidence provided by the CCO's testimony. Abd-Rahmaan, 154 Wn.2d at 290.

The Supreme Court's decision in Abd-Rahmaan controls. Abd-Rahmaan was convicted of delivering cocaine and his sentence included community placement. Abd-Rahmaan, 154 Wn.2d at 282. While Abd-Rahmaan was on community placement, the state sought to modify his sentence on grounds he violated the conditions thereof by failing to report. Abd-Rahmaan, 154 Wn.2d at 283. At the modification hearing, CCO Chris Salatka testified:

Mr. Abd-Rahmaan was instructed to report on all days he does not work at the Millionaires' [sic] Club. When I discovered, after he took his polygraph, he disclosed what he had been doing or had not been doing, I followed up at the Millionaires' [sic] Club. They reported to me that he had not been working on the days that I have listed on December 4th, 10th, 11th, the 12th and 13th.

He was terminated from the Federal Express on the first day he was working for them. And the reason why he was terminated was because they claimed he was dropping products. And he was, I guess he was. It was his job to carry the expensive boxes of alcohol, and he dropped several boxes. So they requested of

him to leave. And at that time Mr. Abd-Rahmaan, according to this particular person at Federal Express, accused him of making threatening and intimidating gestures. They told him they felt unsafe and wanted him out of there. Now, when I followed up with what happened, after the polygraph, the Millionaires' [sic] Club reported to me that he was not allowed to work through the service of the Millionaires' [sic] Club because of what he did at the Federal Express. And, in addition, because Mr. Abd-Rahmaan did not disclose his status.

Abd-Rahmaan, 154 Wn.2d at 283 (citation to record omitted).

The court overruled Abd-Rahmaan's objection to these statements as unreliable hearsay, but did not specifically state the reasons for admitting the hearsay evidence. Abd-Rahmaan was then given an opportunity to present his version of the events. After hearing both accounts, the trial court found that Abd-Rahmaan violated the conditions of his sentence by failing to report to his CCO. Abd-Rahmaan, 154 Wn.2d at 283-284.

The Supreme Court held the trial court's reliance on hearsay under these circumstances violated Abd-Rahmaan's right to minimum due process:

The trial court here made no record to support a conclusion that there was good cause to admit the hearsay evidence. There was neither a showing in the record that the hearsay evidence was demonstrably reliable nor was there any comment on the difficulty or cost in procuring live witnesses. Although written findings are useful, trial courts are

not required to make written findings establishing good cause to admit hearsay evidence in sentence modification hearings; however, appellate courts require some record explaining the evidence on which the trial court relied and the reasons for the admission of the hearsay evidence. These requirements are necessary in order for an appellate court to ascertain whether there is substantial evidence to support the trial court's decision to modify a sentence. Unlike the Court of Appeals, we find the record below insufficient to establish good cause for the admission of the hearsay evidence or the reasons for the trial court's decision. The modification of Abd-Rahmaan's sentence is invalid to the extent the trial court admitted and relied on the hearsay evidence provided by the CCO's testimony.

Abd-Rahmaan, 154 Wn.2d at 290-291.

The same is true here. The only record the court made about the admissibility of Chinn's testimony that "staff from the registration office" told him "McClinton had failed to register on 2-4" was that the rules of evidence either did not apply to the modification proceeding, or that, "at the very least, they are relaxed." 3RP 9-10. The court made no mention of reliability or difficulty in procuring someone from the sheriff's office to give live testimony.

Similarly, the court made no record as to its reasons for admitting the CCO's testimony about the mother's statement McClinton had stayed at her house. The court simply overruled

defense counsel's objection without addressing either the reliability of the statement or the difficulty in procuring the mother as a witness to give live testimony. 2RP 13.

It is clear the court relied on both sets of hearsay to find violations 1 and 5 proved. 3RP 9-11. To that extent, the court's modification of McClinton's sentence is invalid.

In response, the state may argue the error is waived with respect to statements allegedly made by sheriff's office "staff," because counsel did not lodge a contemporaneous objection. Any such argument should be rejected, however, because the record shows an objection would have been a useless endeavor. See e.g. State v. Cantabrana, 83 Wn.App. 204, 208–209, 921 P.2d 572 (1996) (appellate review is not precluded when interposing an objection would have constituted a "useless endeavor" because an earlier objection, interposed on the same ground, had been overruled).

Here, it is the court's subsequent overruling of counsel's contemporaneous objection to the CCO's hearsay testimony about his conversation with the mother that shows an objection to the CCO's earlier testimony about sheriff's office staffers would have been a useless endeavor. Similarly, the court's subsequent ruling

that the rules of evidence either did not apply or were relaxed – in response to counsel’s argument the court should not rely on the hearsay testimony – shows the court would have admitted the evidence and relied upon it, regardless of a contemporaneous objection.

Moreover, the court’s reliance on the hearsay – without considering its reliability or the difficulty in procuring live witnesses – is apparent from the record and concerns McClinton’s Fourteenth Amendment due process right to confront adverse witnesses. Accordingly, the error is manifest constitutional error that may be raised for the first time on appeal. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992); RAP 2.5(a)(3).

In response, the state may also argue the record demonstrates the reliability of the mother’s out-of-court statements because Chinn testified “partners” in his office checked the Union Gospel Mission logs and found no record of McClinton staying there “on the days they asked about.” 2RP 21. But this argument should also be rejected because there is likewise no record regarding the reliability of statements reportedly made by Chinn’s officer partners and also no showing of why they could not be called as witnesses. As in Abd-Rahmaan, the record contains no

“good cause” justification for the court’s admission and reliance on hearsay, as required in order to satisfy due process.

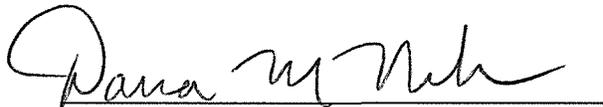
D. CONCLUSION

The court improperly considered unreliable hearsay evidence at the modification proceeding in violation of McClinton’s due process rights. The court’s modification is invalid to the extent it found violations 1 and 5 proved.

Dated this 19th day of August, 2015

Respectfully submitted

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 73301-0-1
)	
SALLYEA McCLINTON,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 20TH DAY OF AUGUST 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SALLYEA McCLINTON
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SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF AUGUST 2015.

X *Patrick Mayovsky*