

NO. 34742-3-II

IN THE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

Mitchell Allen Partee,

Appellant.

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
07 FEB 20 PM 2:11
BY DEPT. CLERK

APPEAL FROM THE SUPERIOR COURT FOR LEWIS COUNTY
The Honorable Stephen Warning, Judge
Cause No. 03-1-166-4

BRIEF OF RESPONDENT

MICHAEL GOLDEN
Prosecuting Attorney
Attorney for Respondent

TABLE OF CONTENTS

I.	TABLE OF CONTENTS	i
II.	TABLE OF AUTHORITIES	ii
III.	ISSUE PRESENTED	1
IV.	STATEMENT OF THE CASE	1,2,3
V.	ARGUMENT.....	3-5
VI.	CONCLUSION.....	5
VII.	REQUEST FOR COSTS	5
VIII.	APPENDIX.....	6

TABLE OF AUTHORITY

Table Of Cases:

State v. Badger, 64 Wn. App. 904, 827 P.2d 318)..... 3

State v. Blank, 131 Wn. 2d 230, 930 P.2d 1213 (1997)..... 5

State v. Reed, 75 Wn. App. 742, 879 P.2d 1,000 (1994).....4

State v. Shannon, 60 Wn.2d 883, 376 P.2d 646 (1962).....5

Statutes:

RCW 9.94A.634(3)(c)..... 17

Court Rules:

RAP14.2, 14.3 5

APPENDIX..... 6,7,8,9,10

ISSUES PRESENTED

Under Washington Law, in a SSOSA revocation hearing, does the trial court have the authority to charge and find additional violations of the treatment program, that have not been alleged by the state, in an effort to create more sanctions against the defendant?

I. STATEMENT OF THE CASE

On July 9, 2003 PARTEE was sentenced under the Sex Offender Sentence Alternative with all but 6 months of 131 months incarceration suspended. RP(7-9-03) 19,20.

In December of 2004, PARTEE violated SSOSA conditions by failing to attend treatment sessions. Both the treatment provider Robert Macy, and the Community Corrections Officer Robert Jelvick recommended allowing PARTEE to continue in the SSOSA program and handle the matter as a probation violation. RP(12-14-04) 38, 48. PARTEE remained in SSOSA program.

In November, 2006, PARTEE again violated SSOSA treatment rules. November 22, 2006 the state filed a motion to modify the existing sentence alleging two violations: having contact with minors and failing a polygraph. The state moved to revoke the defendant's SSOSA as Mr. Macy terminated him from the treatment program for failing to make

satisfactory progress in treatment, and for violating the treatment conditions. RP (3-17-06) 14, 15.

At the SSOSA Revocation hearing, treatment provider Brian Cobb testified as a witness for PARTEE. Mr. Cobb stated that he was not willing to treat PARTEE at this time as he was not amenable. However, Mr. Cobb believed that if PARTEE spent some time in prison, by serving a portion of his sentence, rather than the full 11-years, he would reconsider. RP(3-17-06) 27. Mr. Cobb reasoned that spending time in prison is different than spending time in jail and the experience may shock PARTEE thereby opening his eyes to the consequences of failing to follow the treatment rules. RP (3-17-06) 27, 28. Mr. Cobb concurred with Robert Macy's conclusions that PARTEE represents a risk to public safety. RP(3-17-06) 31.

During argument, PARTEE'S attorney suggested that the court find more than the two violations that were alleged by the state in the 11-22-06 motion. PARTEE suggested that the court treat the violations as probation violations rather than a SSOSA revocation. RP (3-17-06) 35.

The court concluded that he did not have the authority to suspend a portion of PARTEE'S sentence as Mr. Cobb suggested:

The two treatment providers who have met with Mr. Partee say he is not amenable to treatment at

this point. Mr. Cobb's option may very well be an excellent idea, but from a treatment standpoint, I don't believe it is an option that's available to me. Two counts were sentenced together or were sentenced concurrently. I don't think I can go back now and modify the judgment and sentence to undo that so I can't sentence him on one and maintain the suspended sentence on the other. I don't believe it's appropriate to compound violations to give him the kind of time that we are talking about, that Mr. Meyer's suggesting. And in any event, based on some cases that have come down with regard to drug court sanctions, I think we're doing the exactly the same thing. The state of the law is that it would be viewed as time credited against his whole sentence. And so we'd be in the same situation trying to maintain his suspended sentence, would impose a portion of the sentence previously imposed, and I don't think I have the authority to do that. RP(3-17-06) 39

II. ARGUMENT

THE COURT DOES NOT HAVE THE AUTHORITY TO CHARGE VIOLATIONS NOT ALLEGED BY THE STATE.

PARTEE argues that the court could have imposed up to 600 days rather than revoking the SSOSA, calculating 60 days for each of 10 violations. PARTEE argues that the controlling case is State v. Badger, a case in which the court believed it had no discretion to consider a probation violation in lieu of a SSOSA revocation. State v. Badger, 64 Wn. App. 904 at 910, 827 P.2d 318.

The state disagrees. In Badger, the state moved to revoke SSOSA, alleging one violation. The court in Badger could have either treated the violation as a probation violation, imposing 60 days, or revoke SSOSA. The Badger court was unaware that it had the authority to treat the violation as a probation violation. State v. Badger, 64 Wn. App. 904 at 910, 827 P.2d 318.

Our case is different than Badger. Before the trial court in our case were only two violations alleged by the state. Motion to Modify, p.1 Supp. CP. (see attached). The maximum penalty the court could have imposed was 120 days, 60 per violation. RCW 9.94A.634 (3)(c). Any incarceration time less than one-year is completed in the local jail rather than prison. PARTEE'S own expert indicated that jail time was insufficient to change PARTEE'S behavior, indicating that he needed significant time in DOC for the message to sink in. RP (3-17-06) 27,28.

There were not 10 violations before the court, as suggested by PARTEE. The state alleged two violations: contact with minors, and failing a polygraph. The decision to file criminal charges is within the discretion of the prosecutor. State v. Reed, 75 Wn. App. 742, 879 P.2d 1,000 (1994). The court is limited to rule on the allegations before him. Indeed, if the state asked the court to find violations not alleged, they

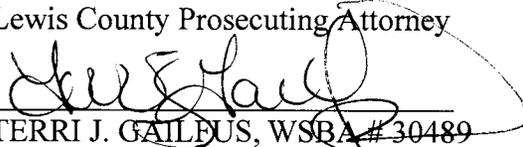
would be a violating Due Process. State v. Shannon, 60 Wn.2d 883, 376 P.2d 646 (1962). PARTEE cannot be accused of one crime and convicted of another. State v. Fraizer, 73 Wn.2d 343, 456 P.2d 352 (1969).

The court ruled on the two allegations before him and, after hearing the testimony of both treatment providers who testified that PARTEE was too much of a threat to the community to be at large, properly revoked PARTEE'S SSOSA.

III. CONCLUSION

Based on the foregoing facts, authority, and argument, the appellant fails to meet his burden, and the State respectfully requests this Court to deny the appeal. Pursuant to RAP 14.2 and 14.3 and RCW 10.73.160, the State respectfully requests that PARTEE be required to pay all taxable costs of this appeal, including the cost of the reproduction of briefs, verbatim transcripts, clerk's papers, filing fee, and the State's statutory attorney's fees. State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997).

Respectfully submitted this 13th day of February, 2007.

JEREMY RANDOLPH,
Lewis County Prosecuting Attorney
By: 
TERRI J. GAILFUS, WSBA # 30489
Deputy Prosecuting Attorney

APPENDIX

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

IN THE SUPERIOR COURT OF STATE OF WASHINGTON
FOR LEWIS COUNTY

STATE OF WASHINGTON,)	
Plaintiff,)	No. 03-1- 00452-3 ⁰⁰¹⁶⁶⁻⁴
)	
vs.)	PETITION FOR ORDER
)	MODIFYING SENTENCE
MITCHELL ALLEN PARTEE,)	
Defendant.)	

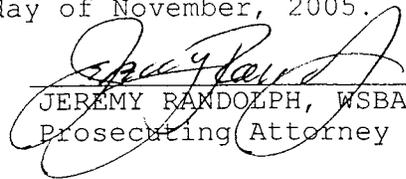
Comes now the undersigned Prosecuting Attorney for Lewis County, Jeremy Randolph, and petitions the court for an order modifying the sentence and/or any subsequent orders modifying entered in this cause pursuant to RCW 9.94A.634 and alleges that the defendant has violated the terms of the order(s) as follows:

1. The defendant admitted having unapproved/unreported contact with minors on no less than eight occasions, specifically on or about October 29, 2005, and November 16, 2005;

2. The defendant failed a polygraph by being deceptive on or about November 21, 2005, as confirmed/discussed with Pete Sheridan(polygrapher).

Wherefore, the petitioner prays for an order modifying the sentence imposed.

DATED this 22nd day of November, 2005.



 JEREMY RANDOLPH, WSBA #2248
 Prosecuting Attorney

PETITION FOR ORDER
MODIFYING SENTENCE

CP, JM 11-22-05



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

COURT-NOTICE OF VIOLATION

REPORT TO: The Honorable Judge Hall
Lewis County Superior Court
OFFENDER NAME: PARTEE, Mitchell A.
AKA:
CRIME: Rape of a Child 2nd, Child
Molestation 2nd
SENTENCE: 131 monts (SSOSA)
Present Address: 109 Brian Dr
Chehalis, WA 98532
MAILING ADDRESS: Same as above

DATE: 11/22/05
DOC NUMBER: 856144
DOB: 10/06/1983
COUNTY CAUSE #: 03-1-452-3
DATE OF SENTENCE: 07/09/03
TERMINATION DATE: 09/17/2014
STATUS: Active
CLASSIFICATION: RMA

PREVIOUS ACTION:

N/A

VIOLATION(S) SPECIFIED: The above-named offender has violated conditions of supervision by:

Violation 1: Admitted having unapproved/unreported contact w/ minors on no less than eight occasions, specifically on/about 10/29/05 & 11/16/05.

Violation 2: Failing polygraph by being deceptive on/about 11/21/05, as confirmed/discussed w/ Pete Sheridan (polygrapher).

SUPPORTING EVIDENCE:

Violation 1: & **Violation 2:** On 07/09/03, Partee was sentenced to a SSOSA sentence (Special Sexual Offender Sentencing Alternative). On his Judgement & Sentence in Appendix H, Partee was court-ordered to have no contact w/ minors without prior approval from his CCO and/or Sex Offender treatment provider. On 11/17/05, I received a call from Det. Brad Borden regarding information that Mitch Partee had been dating a 22 yr old girl (Breanna Deck) and possibly having contact w/ minors as a result. Upon investigation with Breanna and her family, it was alleged that Partee was involved in a sexual relationship w/ her and had numerous extended contacts with her siblings (15 yo sister and 11 yo brother) and several contacts with her niece(s)/nephew(s) who visited. Reports stated that Partee frequented Breanna's home quite regularly in the evenings for dinner and other activities when Partee knew minors were present and that he failed to remove himself from the situation. On 11/17/05, I instructed Partee to report to the office and discuss the situation. At that time, Partee denied knowingly having extended contact with minors as reported. However, he did acknowledge being there while her younger siblings were there, but that he left when he became aware of their presence. Partee was also questioned about having an unapproved sexual relationship with Breanna Deck without the approval of his sex offender treatment provider (Bob Macy). He denied that the relationship was sexual in nature, but that they had stayed together several times. After staffing with CCS Albert, we felt probable cause had been established to believe Partee was having unapproved contact with minors. Thus, Bob Macy was contacted and he confirmed that Partee had not divulged the sexual relationship with Breanna or any minor contacts in his treatment groups. As a result, an emergency polygraph was scheduled with Pete Sheridan for 11/21/05. Following the polygraph on 11/21/05, Partee reported to DOC office and divulged, to CCS Albert and I, that he had previously lied about the extent of his contact with minors and the sexual nature of his relationship with Breanna. Upon questioning, Partee specifically stated he knowingly had at least eight extended contacts with Breanna's siblings and stayed overnight at their home with them, on 10/29/05, while their parents were out of town. He also admitted watching movies with Breanna and her younger sister on 11/16/05, in addition to other numerous contacts while Breanna's parents were at home. Partee was then taken into custody and detained at the Lewis County Jail on 11/21/05. On 11/22/05, I spoke to Pete Sheridan (polygrapher) who will be sending the polygraph results to Bob Macy and DOC. Another in-depth polygraph will be scheduled to address other potential areas of concern. More to follow from Bob Macy as well.

ADJUSTMENT:

Dept. of Corrections is supervising Mitchell A. Partee for Rape of a Child 2nd Degree & Child Molestation 2nd Degree. He was sentenced to 131 months confinement, with 125 months suspended under the terms of the Special Sex Offender Sentencing Alternative (SSOSA). Partee was released from the Lewis County Jail and began the community portion of his SSOSA sentence on 10/19/03. He has been compliant with the supervision and reporting to CCO Jelvik,

as instructed. However, a SSOSA review hearing (report dated 10/18/04) was held to address previous inconsistencies in his sex offender treatment participation and sporadic payments to his Legal Financial Obligations to Lewis County. Partee continues to maintain full-time employment at Aluminite in the Chehalis Industrial Park.

RECOMMENDATION:

DOC recommends that Lewis County issue a warrant/detainer for Partee's arrest and enact a SSOSA violation hearing. Bob Macy, certified Sex Offender treatment provider, supports this action and will forward a formal report to the court and DOC upon obtaining/reviewing the polygraph and current violations. DOC may submit an addendum to this report as well.

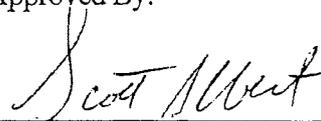
I certify or declare under penalty of perjury of the laws of the state of Washington that the foregoing statements are true and correct to the best of my knowledge and belief.

Submitted By:

Approved By:



11-22-05
DATE



11-22-05
DATE

Robert Jelvik
COMMUNITY CORRECTIONS OFFICER
DOC - Chehalis
125 NW Chehalis Ave
Chehalis, Washington 98532
Telephone (360) 748 - 2185

Scott Albert, CCS

TYPIST/CCO/

Distribution: **ORIGINAL** - Court **COPY** - Prosecuting Attorney, Defense Attorney, File

The contents of this document may be eligible for public disclosure. Social Security Numbers are considered confidential information and will be redacted in the event of such a request. This form is governed by Executive Order 00-03, RCW 42.17, and RCW 40.14.

CERTIFICATE

I certify that on 2-16-07 I mailed a copy of the foregoing Brief of Respondent by depositing same in the United States Mail, postage pre-paid, to the following parties at the addresses indicated:

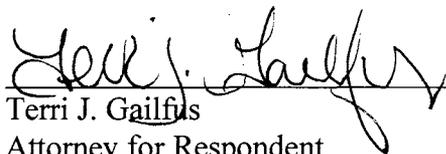
Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant
203 East Fourth Avenue, Suite 404
Olympia, WA 98501

Mitchell Partee
P.O.Box 1205
Chehalis, WA 98532

Court of Appeals Division II
950 Broadway, Suite 300
Tacoma, WA 98402

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
07 FEB 20 PM 2:12
BY DEPUTY

DATED this 16th day of February 2007.



Terri J. Gailfus
Attorney for Respondent
WSBA No. 30489