

ORIGINAL

NO. 36049-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER HOURIHAN,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
08 JAN 10 PM 12:54
STATE OF WASHINGTON
BY [Signature]

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 04-1-00587-4

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court properly considered all the surrounding facts and circumstances in weighing whether to revoke Hourihan's suspended SSOSA sentence or to impose a lesser sanction after he admitted to two violations of the conditions of his sentence?

2. Whether the trial court acted within its discretion when it followed the recommendations of Hourihan's own expert and the pre-sentence investigator and imposed as a condition of his supervision that Hourihan have no unsupervised contact with minors?

II. STATEMENT OF THE CASE

Christopher Hourihan was charged by information filed in Kitsap County Superior Court with the first-degree child molestation of his girlfriend's daughter. CP 1. Hourihan waived trial by jury and agreed to entry of judgment on stipulated facts. CP 10, 87.

Hourihan sought a SSOSA sentence. He was initially evaluated by Michael Comte, who concluded that Hourihan was not a suitable candidate for the sentencing alternative because he was deceptive about his sexual history. CP 43.

Hourihan thereafter obtained an evaluation by Allen Traywick, who concluded that Hourihan was "a marginal candidate." CP 45. Over the

opposition of the State, CP 133, and the community corrections officer (CCO) who prepared the pre-sentence investigation, CP 129, State's Supp. CP, the trial court imposed a SSOSA sentence on March 11, 2005.

On March 11, 2006, the CCO filed a violation notice based on conduct occurring between November 2005 and March 2005. CP 101, 142. The notice was based on four violations: (1) failure to stay within mandated geographical boundaries; (2) use of alcohol; (3) unsupervised contact with his minor daughter (who he had molested in the past) (4) and use of marijuana. RP (3/22/06) 4-5; RP (5/15/06) 13. On May 15, 2006, Hourihan admitted the violations and the trial court imposed a sanction of 30 days jail time in addition to 53 days credit for time served. RP (5/15/06) 19-20. The court warned him that he was unlikely to get a second break. RP (5/15/06) 19.

On October 2, 2006, the CCO filed a second violation report. CP 113, 155. This time the cited violations were an August shoplifting incident (the victim was Hourihan's employer) and unsupervised contact with his five-year-old son. RP (11/28/06) 15, 19-20.

A violation hearing was held at the conclusion of which Judge Hartman found that the State had proved both alleged violations. RP (11/28/06) 51-53. The matter was set over for a disposition hearing. At that

hearing, Judge Hartman realized an affidavit of prejudice had been filed against him in the case in 2005. RP (2/15/07) 17. Judge Hartman therefore ruled that his findings were void, and the matter was to be reheard before a different judge. *Id.*

A hearing commenced on February 6, 2007. Hourihan admitted both charged violations and the matter was set over for disposition. RP (2/6/07) 2-3.

After extensive argument from the CCO, the State, Hourihan and his counsel, the trial court ruled that it would be revoking Hourihan's suspended SSOSA sentence. CP 119. The trial court gave an extensive oral ruling:

In reviewing the file, deception has been a continuing theme, even from the time that Mr. Hourihan was granted the SSOSA. Despite the deception factor, as noted by Michael Comte in the original psychosexual evaluation, and also a finding that Mr. Hourihan was only a marginal candidate, as determined by Dr. Rawlins in a second evaluation, despite opposition from both the department and the prosecutor, the judge at that time determined that Mr. Hourihan would be allowed to enter into the SSOSA program.

Clearly the hope, it would seem, was that Mr. Hourihan would prove himself to be a viable participant for the SSOSA program and would follow through with all the requirements and all of the conditions imposed by the CCO.

* * *

So having considered all of this, therein lies a very serious and significant issue in this revocation hearing.

Mr. Hourihan has violated terms and conditions of his probation. That is undisputed. The question for this court, do these violations warrant the State's request to revoke the

SSOSA. In making this decision, I looked at all the facts and circumstances, as well as the history in this case, and in doing so, I am granting the request to revoke.

The two new violations, subject of the motion, came on the heels of Mr. Hourihan being incarcerated for previous probation violations, 3 to 4 months after released from jail. Moreover, one of the current violations is a repeat violation, for which he just spent time in jail; that's having unsupervised contact with the child.

Moreover, as presented by the department, Mr. Hourihan has not been forthcoming when he has violated the conditions. He did not provide information surrounding the violations until such time as he was presented with the polygraph or the eminent threat of a polygraph. I find Mr. Hourihan has been deceptive in failing to come forward with the violations in a reasonable and timely manner. Unsupervised contact with his son, occurred on September 24th. Mr. Hourihan was reminded of the conditions on September 26th. And it was not until September 29th that he came forward with the information, and that was when the polygraph was conducted.

Mr. Hourihan was also told, as a condition to the SSOSA at sentencing, he was to obey all criminal laws. It was not until the polygraph of September 29th, that he admitted to the shoplifting.

Necessary for the success of a SSOSA is a willingness of participant to submit openly and honestly with the community corrections officer, thereby addressing all issues that brought him into the court system for the underlying offense, and in this case, the underlying offense was child molestation. Mr. Hourihan was not forthcoming until such time presented with such polygraph. I am sensitive to the comment by the examiner, Ardith Schrag, who is quoted to have said, "The fact that he comes in just before the polygraph is scheduled and makes some admissions is a dangerous practice."

In light of the deception or at the very least, lack of coming forward, Mr. Hourihan has proved he is not an appropriate participant to continue to participate in the

SSOSA program. I find with this demonstration, Mr. Hourihan is a danger to the community and further he has proven that he is not amenable to abiding by the terms of the program. I considered Dr. Traywick's analysis, while Dr. Traywick supports continuation in the SSOSA program, he does not address Mr. Hourihan's failure to admit to the violations, prior to implementation of a polygraph.

In his conclusions, Dr. Traywick recommends continuation and attributes Mr. Hourihan's violations to flaws in judgment.

Interesting, Dr. Traywick writes that if Mr. Hourihan continues in the SSOSA program, the following are important to consider. He then lists 4 items, the last of which is quote, "Mr. Hourihan should be expected to follow all directives of his judgment and sentence, his CCO, and his treatment provider."

As I understand the presentation made before the court, it is this very failure to follow the directives of the CCO that has been Mr. Hourihan's failing in the SSOSA program.

I am persuaded that Mr. Hourihan is genuine in that he indicates that counselling, therapy, has been a help to him. But that is not the be all and end all of the SSOSA program. He is required to follow all the program requirements, to progress successfully and to demonstrate he is addressing the issues that brought him into the program.

Mr. Hourihan was given a chance by being accepted into the program, despite an unfavorable recommendation by Mr. Compte. He was given a further chance to prove that he is a viable participant, following the violations in March of '06. The same issue of failure to come forward was made a part of the court record at that time. I simply cannot ignore the continuing pattern that has been demonstrated by Mr. Hourihan. He is approximately 2 years into the SSOSA program and the issue of deception and failing to come forward remains.

He has proven that he is not amenable to the conditions of the SSOSA program and his failure to work candidly without coercion of a polygraph. I believe this does indeed pose a danger to the community and therefore I am

granting the request to revoke the SSOSA. So that is my ruling, Mr. Hourihan.

RP (2/22/07) 4-9.

This appeal follows.

III. ARGUMENT

A. THE TRIAL COURT PROPERLY CONSIDERED ALL THE SURROUNDING FACTS AND CIRCUMSTANCES IN WEIGHING WHETHER TO REVOKE HOURIHAN'S SUSPENDED SSOSA SENTENCE OR IMPOSE A LESSER SANCTION AFTER HE ADMITTED TO TWO VIOLATIONS OF THE CONDITIONS OF HIS SENTENCE.

Hourihan argues that that the trial court denied him due process by revoking his SSOSA sentence on the basis of allegations for which he had no notice. This claim is without merit because Hourihan admitted the violations for which his suspended sentence was revoked, and waived any further claim as to the admissibility of the evidence considered by the court.

This Court reviews a trial court's decision to revoke a SSOSA suspended sentence for abuse of discretion. *State v. Partee*, ___ Wn. App. ___, 170 P.3d 60, ¶ 13 (2007). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds. *Id.* A court may revoke an offender's SSOSA at any time if it is reasonably satisfied the offender violated a condition of the suspended sentence. *Id.*, (citing *State v. Dahl*, 139 Wn.2d 678, 683, 990 P.2d 396 (1999), and RCW

9.94A.670(10)(a)). Thus where the defendant stipulates that he has violated conditions of his SSOSA suspended sentence, this Court will not find an abuse of discretion. *Partee*, 170 P.3d at ¶ 13.

Here, Hourihan received notice of the two violations with which he was charged and of which he was found to have committed. CP 113, 151. Indeed, an entire evidentiary hearing was conducted on them, RP (11/28/06) 3-58, but was then voided because the judge was disqualified from hearing the case because of an earlier-filed affidavit of prejudice. RP (2/15/07) 17. Hourihan thereafter admitted to the violations, upon which they were deemed proved. RP (2/6/07) 2-3; CP 119. The trial court revoked his SSOSA suspended sentence based on the admitted violation:

Mr. Hourihan has violated terms and conditions of his probation. That is undisputed. The question for this court, do these violations warrant the State's request to revoke the SSOSA. In making this decision, I looked at all the facts and circumstances, as well as the history in this case, and in doing so, I am granting the request to revoke.

RP (2/22/07) 6; CP 120.

Hourihan's reliance on *State v. Dahl* is thus misplaced. *Dahl* requires notice of the violations charged. *Dahl*, 139 Wn.2d at 684. As noted, that was done here. Likewise, as in *Dahl*, the State did not allege any violations of Hourihan's SSOSA sentence other than the charged violations, which, as also noted, Hourihan admitted.

To the extent that Hourihan is attempting to argue that the court considered improper evidence when it weighed whether the admitted violations warranted revocation, he has waived that claim:

A “[d]efendant’s failure to object to a violation of due process and his own use of hearsay during argument constitute[s] a waiver of any right of confrontation and cross examination.”

Dahl, 139 Wn.2d at 687 n. 2 (quoting *State v. Nelson*, 103 Wn.2d 760, 766, 697 P.2d 579 (1985) (alterations the Court’s)).

Here, not only did Hourihan not object to the trial court’s use of this evidence, he appeared to invite it. Indeed, just after the passage he quotes in his brief, Brief of Appellant at 21-22, counsel further informed the court that once a violation was established, “at disposition the floodgates are pretty much open” RP (11/28/06) 25.

More importantly, at the disposition hearing itself, not only did Hourihan not object to the court’s consideration of evidence beyond the violations themselves, Hourihan overtly invited the court to undertake the analysis of “all the facts and circumstances,” RP (2/22/07) 6, that it did:

But fundamentally the court needs to decide two issues in my opinion, and those are the same two issues that the court needed to decide when the court originally granted the SSOSA. No. 1, today, February 15th, 2007, is Mr. Hourihan amenable to treatment; and no. 2, if he’s released for community-based treatment, does that pose a threat to the community? Those are the two questions the court has to answer. If the court answers that either he’s not amenable to treatment or risk to community safety, I think the court has no

choice but to revoke the SSOSA.

RP (2/15/07) 13-14. Hourihan then proceeded to present argument that went far afield from the admitted violations and extensively discussed his amenability to treatment and the progress he had or had not made in the two years since sentencing, to the point that counsel himself was essentially testifying. RP (2/15/07) 14-20.

Having not only failed to object to the evidence in question, but having affirmatively asked the court to consider it, and presented his own hearsay testimony, Hourihan cannot now claim his due process rights were violated. *Dahl*. Because the trial court did not abuse its discretion in revoking Hourihan's SSOSA sentence based on his admitted violation of its conditions, this claim must be rejected.

B. THE TRIAL COURT ACTED WITHIN ITS DISCRETION BY FOLLOWING THE RECOMMENDATIONS OF HOURIHAN'S OWN EXPERT AND THE PSI WRITER AND IMPOSING AS A CONDITION OF HIS SUPERVISION THAT HOURIHAN HAVE NO UNSUPERVISED CONTACT WITH MINORS.

Hourihan next claims that the sentencing condition that he have no unsupervised contact with minors is unconstitutional. Given that Hourihan molested both his own daughter, and the daughter of his girlfriend, it cannot be said that this restriction was beyond the reach of the trial court. Moreover,

even if the condition were improper, any error would be harmless because the remaining condition Hourihan violated was clearly valid, and the record shows the trial court would have revoked his suspended SSOSA sentence even without the violation of the allegedly unconstitutional condition.

Parents do have a fundamental constitutional right to raise children without interference by the state. *State v. Letourneau*, 100 Wn. App. 424, 438, 997 P.2d 436 (2000). But in the criminal sentencing context, community custody restrictions of this right are permissible if they are reasonably necessary to further the government's compelling interest in protecting children. *Letourneau*, 100 Wn. App. at 439-42; *see also State v. Riles*, 135 Wn.2d 326, 350, 957 P.2d 655 (1998). The trial court's decision to impose a crime-related prohibition is reviewed for an abuse of discretion. *State v. Powell*, 139 Wn. App. 808, ¶ 28, 162 P.3d 1180 (2007).

If the record shows that it is reasonably necessary to prevent harm to the children, a court can impose a sentence condition that restricts a defendant's fundamental right to parent. *State v. Sanford*, 128 Wn. App. 280, 288, 115 P.3d 368 (2005); *State v. Ancira*, 107 Wn. App. 650, 654, 27 P.3d 1246 (2001). The crime-related prohibition must relate to the crime, but the prohibition "need not be causally related to the crime." *Letourneau*, 100 Wn. App. at 432 (citing *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992)). And the prohibition must be reasonably necessary to "help

prevent the criminal from further criminal conduct for the duration of his or her sentence.” *Letourneau*, 100 Wn. App. at 438.

Washington courts have previously rejected constitutional challenges to community custody conditions imposed on sex offenders that restrict the offender’s ability to have contact with children. For instance, in *State v. Riles*, 86 Wn. App. 10, 936 P.2d 11 (1997), the defendant challenged his community placement prohibition on contact with children, arguing that it was overbroad and infringed on his constitutional rights of free association and speech. *Riles*, 86 Wn. App. at 15. The court, however, noted that a defendant’s constitutional rights during community placement are subject to the infringements authorized by the SRA. *Riles*, 86 Wn. App. at 15 (*citing State v. Ross*, 129 Wn.2d 279, 287, 916 P.2d 405 (1996)). In addition, the Court noted that RCW 9.94A.120(9)(c)(ii)¹ expressly authorized the sentencing court to condition a sex offender’s community placement by ordering that “[t]he offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals.” *Riles*, 86 Wn. App. at 15. Furthermore, an offender’s freedom of association may be reasonably restricted. *Riles*, 86 Wn. App. at 15 (*citing State v. Riley*, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993)). The *Riles* court concluded, therefore, that the

¹ Recodified as RCW 9.94A.700(4).

challenged order was plainly authorized by the SRA, and upheld the no-contact condition. *Riles*, 86 Wn. App. at 15.

The Washington Supreme Court affirmed this Court's decision in *Riles*. *State v. Riles*, 135 Wn.2d 326, 957 P.2d 655 (1998). In so doing, the Supreme Court rejected the defendant's constitutional challenges to the terms of his community custody and held that prohibiting the defendant "from having contact with minor-age children for the period of his community placement upon his release from prison is a reasonable restriction imposed upon him for protection of the public -- especially children." *Riles*, 135 Wn.2d at 347.

In *Letourneau*, upon which Hourihan relies, the Court held that the State had failed to demonstrate that restrictions on the defendant's contact with her children were reasonably necessary. The record in *Letourneau* contained the opinions of four evaluators who discussed the merits of the prohibition, and who "were unanimous in their conclusions that Letourneau [was] not a pedophile." *Letourneau*, 100 Wn. App. at 441. The court found unpersuasive one evaluator's opinion that the prohibition was valid because Letourneau "would 'mold' her children's minds based on her distortions as she did with her victim." *Letourneau*, 100 Wn. App. at 440. Thus, the record did not support the prohibition forbidding Letourneau from contact with her children.

Here, on the other hand, Hourihan specifically noted that he “had been in denial about his pedophilia.” CP 40. Hourihan admitted to having sexual fantasies about children. CP 39. Hourihan told Dr. Rawlings that his “sexual feelings about children have gone up and down over the years and sometimes he has felt out of control.” CP 41.

Unlike the experts in *Letourneau*, Dr. Rawlings concluded that Hourihan *was* a pedophile, CP 45, and noted that “his pattern of molestation mostly involved offending against children who were acquaintances.” CP 44. Rawlings therefore specifically recommended that if a SSOSA sentence were granted, Hourihan “should be placed under very strict supervision.” CP 46. Rawlings stipulated that one of the conditions of that strict supervision should be that Hourihan “have no contact with minors.” CP 46. Rawlings then reiterated, “Mr. Hourihan should not have *any* contact with minors at this time.” CP 46 (emphasis supplied). The PSI writer also recommended that Hourihan not be permitted to have unsupervised contact with minors. Supp. CP.

It should be noted that this recommendation was pursuant to Dr. Rawlings’s conclusion that Hourihan was “marginally” suitable for a SSOSA sentence. CP 45. Michael Comte, who had previously evaluated Hourihan, also diagnosed Hourihan as a pedophile, but concluded that Hourihan was not an appropriate SSOSA candidate because he was not truthful about his sexual

history.

Additionally, the record reveals a significant history of deviant sexual ideation and acts, which included, among other things, sex with children. Hourihan molested both his own daughter and that of his girlfriend. RP (5/15/06) 7, 13; CP 35. The acts involving the girlfriend's daughter, which were the basis of the instant conviction, occurred when she was nine years old. CP 4, 35. Hourihan had been living with them for two years at the time of the offenses. CP 5.

Earlier, when Hourihan's sister was 13 or 14, he stole her underwear on 20 or 30 occasions and masturbated on it. CP 35. Her also reported trying to watch his sister through the window when she was undressing, and peeping on her while she was showering. CP 35.

When he was 15, he fondled his 10-year-old step-sister's breasts. CP 38.

Hourihan further admitted to molesting a five-year-old in 1995 by rubbing his penis on her. CP 36.

Hourihan admitted to sneaking into a house belonging to a woman he minimally knew in 1995. CP 39. The woman was caring for several children between the ages of five and 18. CP 39. He asked a ten-year-old girl there which bed she slept in, hoping to sleep with her. CP 39. While he denied

actually molesting any of the children, Hourihan specifically admitted that his actions were sexually motivated. CP 39.

From 1993 to 1998, Hourihan made advances or engaged in sexual activity with about eight minors. CP 40.

In 2000, he followed a girl home from the school-bus stop to see where she lived. CP 40. He masturbated while fantasizing about her. CP 40.

In light of this record and the professional opinions before the trial court, that court did not abuse its discretion in imposing the following condition:

Have no contact with any children under the age of 18 without the presence of an adult who is knowledgeable of this conviction and who has been approved by Defendant's CCO.

CP 90. Notably, the condition, which permits supervised contact with CCO approval, is less restrictive than that recommended by Dr. Rawlings, who recommended *no* contact.

Here, unlike in *Letourneau*, no expert opined that it would be appropriate for admitted pedophile Hourihan to be permitted unsupervised contact with *any* child, regardless of gender. Hourihan himself apparently did not contest the provision at sentencing. He did not contest it at his earlier violation proceeding and he did not contest it in the proceeding on appeal. To the contrary, he admitted the violation. There is thus no factual basis

upon which this Court could conclude that the provision was not appropriate. *Cf. State v. Kirkpatrick*, 160 Wn.2d 873, ¶ 13, 161 P.3d 990 (2007) (an error will not be deemed “manifest” where, as a result of the appellant’s failure to raise the issue at trial, this Court would have to engage in fact-finding an appellate “court is ill equipped to perform.”).

For all of these reasons, the record in the present case, unlike the record in *Letourneau*, was sufficient to show that the challenged condition was reasonably necessary to further the government’s compelling interest in protecting children. Thus, the trial court was authorized to restrict Hourihan’s right to raise children without interference by the state. *Letourneau*, 100 Wn. App. at 439-42; *see also, Riles*, 135 Wn.2d at 350.

Moreover, even if this restriction were improper, any error would be harmless. Violations of the minimal due process rights at revocation hearings are subject to harmless error analysis. *Dahl*, 139 Wn.2d at 688. There, the Court observed that in “revocation cases, the harm in erroneously admitting hearsay evidence ... is the possibility that the trial court will rely on unverified evidence in revoking a suspended sentence.” *Dahl*, 139 Wn.2d at 688. The present situation is analogous. *See also, State v. Fry*, 15 Wn. App. 499, 501, 550 P.2d 697 (judge’s failure at revocation hearing to make written findings of fact was harmless because the judge’s oral opinion provided ample record of evidence on which the judge relied and his reasons for

revocation), *review denied*, 87 Wn.2d 1008 (1976); *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (constitutional error in omitting an element from a jury instruction is harmless if “it appears ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’”) (quoting *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).

Hourihan does not challenge the propriety of the second sentencing condition, obeying the law, that he violated.² Both the State and, more importantly, the court, recognized the relatively *de minimis* nature of the violations. It was not either violation per se that the court found warranted revocation. It was that they were further evidence of Hourihan’s ongoing lack of candor and failure to follow the rules of his supervision that led the court to revoke rather than sanction on the finding of the violations. Moreover, even if the condition were invalid, Hourihan never asserted his belief that it was. To the contrary, he admitted to it. Thus even if no enforceable violation occurred as to the contact, the basic reasons for revocation, Hourihan’s continuing unsuitability for the program, remained. As such, there is no reasonable likelihood that if the contact violation were

² Given that she was a prior victim of molestation by Hourihan, it cannot seriously be argued that the no-unsupervised-contact condition would be unconstitutional as applied to his daughter. The previous violation of this condition, in March 2005, involved her.

stricken, the trial court would not still revoke Hourihan's suspended sentence. Thus, even if the condition were unconstitutional as applied to Hourihan's son, the revocation should be affirmed.

IV. CONCLUSION

For the foregoing reasons, Hourihan's conviction and sentence should be affirmed.

DATED January 8, 2008.

Respectfully submitted,

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Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'RAS', with a long horizontal flourish extending to the right.

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