

No. 36147-7--II

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

STATE OF WASHINGTON,

Respondent,

v.

XAVIER CHARLES JOHNSON,

Appellant/Defendant.

PIERCE COUNTY SUPERIOR COURT

CAUSE NOs. 04-1-02146-6

THE HONORABLE JAMES ORLANDO,

Presiding at the Trial Court.

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

	<u>Page(s)</u>
A. ASSIGNMENTS OF ERROR.....	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	1-2
C. STATEMENT OF THE CASE.....	2-10
1. Procedural Summary.....	1-4
2. Plea and Sentencing Hearings.....	4-6
3. SSOSA Review Hearings.....	6-10
D. ARGUMENT.....	10-21
I. THE TRIAL COURT VIOLATED MR. JOHNSON’S DUE PROCESS RIGHTS AND ABUSED ITS DISCRETION WHEN IT REVOKED HIS SSOSA SENTENCE.....	10
II. ALTERNATIVELY, MR. JOHNSON’S GUILTY PLEA SHOULD BE VACATED BECAUSE IT WAS ENTERED UNDER THE MISTAKEN BELIEF THAT THE STATE WOULD PROVIDE DEVELOPMENTALLY DISABLED ASSISTED LIVING WHICH WAS NECESSARY FOR MR. JOHNSON TO SUCCESSFULLY COMPLETE HIS SSOSA SENTENCE.....	17

TABLE OF CONTENTS (continued)

	<u>Page(s)</u>
E. CONCLUSION.....	21

TABLE OF AUTHORITIES

Washington Cases

	<u>Page(s)</u>
<u>Seattle v. Lea</u> , 36 Wn.App. 859,786 P.2d 798 (1990).....	11
<u>State v. Adams</u> 119 Wash.App. 373,82 P.3d (2003).....	20
<u>State v. Badger</u> , 64 Wn.App. 904,827 P.2d 318 (1992).....	11,12
<u>State v. Barton</u> , 93 Wn.2d 301,305,609 P.2d 1353 (1980).....	19
<u>State ex rel. Carroll v. Junker</u> , 79 Wn.2d 12,482 P.2d 775 (1971).....	15
<u>State v. Dahl</u> , 139 Wn.2d 678,990 P.2d 396 (1998).....	12,16
<u>State v. Daniels</u> , 73 Wn.App. 734,871 P.2d 634 (1994).....	11
<u>State v. Gropper</u> , 76 Wn.App. 882,888 P.2d 1211 (1995).....	11
<u>State v. Kissee</u> , 88 Wash.App. 817,947 P.2d 262 (1997).....	20
<u>State v. Miller</u> , 110 Wn.2d 528,531,756 P.2d 122 (1988).....	19,20
<u>State v. Morrison</u> , 70 Wn.App. 593,855 P.2d 696 (1993).	11
<u>State v. Rohrich</u> , 149 Wn.2d 647,71 P.3d 638 (2003).....	15
<u>State v. Ross</u> , 129 Wn.2d 279,284,916 P.2d 405 (1996).....	18
<u>State v. Swindell</u> , 22 Wn. App. 626,630,590, P.2d 1292(1979), <i>affirmed</i> Wn.93 Wn.2d 192,607 P.2d 852 (1980).....	19

TABLE OF AUTHORITIES

Washington Cases (continued)

Page(s)

State v. Taylor, 83 Wn.2d 594,598,521 P.2d 699 (1974).....18

State v. Wakefield, 130 Wn.2d 464,472,925 P.2d 183 (1996).....18

State v. Walsh, 143 Wash. 2d 1, 5-6, 17 P.3d 591 (2001).....19,20

Wood v. Morris 87 Wn. 2d 501,511,554 P.2d 1032 (1976).....19

State v. Zumwalt, 97 Wn.App. 124,901 P.2d 319 (1995).....18

Washington Statutes

RCW 9A.44.076.....2

RCW 9.94A.120.....8

RCW 9.94A.670.....10,11

Washington Court Rules

RAP 2.5 (a).....20

CrR 4.2 (f).....18

Federal Cases

Gagnon v. Scarpelli, 411 U.S. 778,782,93 S.Ct. 1756,
36 L.Ed 2d 858 (1973).....12

Morrissey v. Brewer, 408 U.S. 471,482,92 S.Ct. 2593,
33 L.Ed.2d 484 (1972).....12,13,14,15,16

A. ASSIGNMENTS OF ERROR

1. Mr. Johnson's due process rights were violated where he neither stipulated to nor received an evidentiary hearing on the State's allegations of violations and where the trial court found no specific violations to justify revocation of the SSOSA sentence.

2. Mr. Johnson's guilty plea was predicated upon the mistaken belief that he would receive the developmentally disabled living assistance necessary to complete a SSOSA program.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Where Mr. Johnson did not stipulate to the alleged violations of the terms of his suspended SSOSA sentence was he entitled to a full evidentiary hearing including the right to present evidence and cross-examine adverse witnesses? (Assignment of Error Number One)

2. Was the trial court required to find specific violations alleged by the State and provide reasons relevant to such violations to support the revocation of Mr. Johnson's suspended SSOSA sentence? (Assignment of Error Number Two)

3. Is vacation of Mr. Johnson's guilty plea necessary to correct a manifest injustice where the successful completion of SSOSA treatment was rendered impossible by the State's failure to provide the necessary assisted living? (Assignment of Error Number Two)

C. STATEMENT OF THE CASE

1. Procedural Summary

On April 30, 2004, the defendant/appellant, Xavier Charles Johnson, was charged by Information with three counts of second degree rape of a child, in violation of RCW 9A.44.076. CP 1-3. The Declaration for Determination of Probable Cause alleged that on three occasions, Mr. Johnson, who was nineteen (19) years old, had sexual intercourse with M.E. who was thirteen (13) years old. Both Mr. Johnson and M.E. were described as "mentally challenged." CP 1-3. Mr. Johnson confessed to having sex with M.E. on three occasions, although notably no mention is made that he was Mirandized. Likewise, the declaration made no mention of any forensic evidence collected.

Johnson, Xavier C.- Opening Brief COA No. 36147-7-II

On May 25, 2004, the trial court ordered the appointment of an expert to evaluate Mr. Johnson's competency to stand trial. CP 129-130. No subsequent rulings were entered with respect to that Order.

On July 27, 2007, Mr. Johnson entered a guilty plea to two counts of second degree rape of a child pursuant to an Amended Information filed on the same date. CP 7-17, 4-5; RP 3-8.

On December 14, 2004, the trial court imposed a SSOSA sentence consistent with the agreed recommendation of the parties. CP 21-34, 37-39; RP 9-24. Mr. Johnson's one hundred thirty-one (131) month sentence was suspended for all but six months.

Between March of 2005 and March of 2007 a series of SSOSA Review Hearings were held.

On March 2, 2007, the court revoked Mr. Johnson's suspended sentence and ordered him to serve the standard range term of one hundred thirty-one (131) months to life in the Department of Corrections. CP 117-118; RP 102-104.

A timely Notice of Appeal was filed on March 29, 2007. CP

119-121.

2. Plea and Sentencing Hearings

At the plea hearing, the State represented that the original Information was amended in order to allow Mr. Johnson to qualify for SSOSA. RP 3.

Although defense counsel represented that Mr. Johnson had graduated from the 12th grade and does not “read very well,” the record shows that, in fact, Mr. Johnson “is mentally retarded.”¹ RP 3; CP 131-145. According to the CCO he was “always in special education” and probably never received a diploma. “His academic skills are at or below a second grade level.” His I.Q. has been documented between 44 and 55 to 69. “He is illiterate.” “His mental age appears to be that

1

“Mentally retarded” means the individual has: 1) Significantly subaverage general intellectual functioning; (ii) existing concurrently with deficits in adaptive behavior; and (iii) both significantly subaverage general intellectual functioning and deficits in adaptive behavior were manifested during the developmental period.

(c) “Significantly subaverage general intellectual functioning” means intelligent quotient seventy or below.

Johnson, Xavier C.- Opening Brief COA No. 36147-7-II

of an 11 or 12 year old.” “ In brief, Xavier’s issues are related to his mental retardation. He is not criminally oriented nor at all sophisticated.” See Pre-Sentence Investigation Report (PSI), pages 5, 7, 9, 10, CP 131-145. ²

Notably, both the CCO and the proposed SSOSA treatment provider indicated that Mr. Johnson needed to be placed in assisted living by DSHS. PSI p.6, 11.

At the sentencing hearing, proposed treatment provider Michael Compte advised the Court that DSHS had not yet provided a supervised residence for Mr. Johnson. Mr. Compte, nonetheless, was willing to treat Mr. Johnson and advocated for the court to give him “a chance.” RP 11. The CCO indicated that, while unfortunate, the Department of Corrections was “not comfortable trying to supervise” a person with Mr. Johnson’s limited mental abilities unless a DSHS

2

The PSI writer refers to the report prepared by Compte & Associates on July 20, 2004. The “Confidential” Compte report was included in the Second Supplemental Designation of Clerk’s Papers, and sent by the Pierce County Superior Court clerk’s office under separate cover on October 5, 2007. CP 146.

Johnson, Xavier C.- Opening Brief COA No. 36147-7-II

assisted living situation was in place. RP 12. To the State's credit it abided by its agreement to recommend SSOSA. RP 13. The trial court considered this "a tragic case all the way around," but determined that Mr. Johnson "is amenable to treatment." RP 18-19.

3. SSOSA Review Hearings

As previously noted, a series of hearings were held between March 2005 and March 2006 to review Mr. Johnson's progress in treatment. Progress was slow due to Mr. Johnson's "limited ability" as well as Compte and Associates' inability to work with a person as developmentally disabled as Mr. Johnson. The trial court surmised that the treatment providers "may have bitten off more than they can chew" and questioned Compte's commitment to treating Mr. Johnson. RP 48, 52-53.

Ultimately, Dr. Mark Whitehill replaced Compte and Associates after Mr. Johnson was unable to keep up with financial payments to Compte and Associates. CP 67, 77-78. On November 18, 2005, the trial court ordered that SSOSA treatment be continued for an additional

Johnson, Xavier C.- Opening Brief COA No. 36147-7-II

thirty-six (36) months with Dr. Whitehill. CP 77-78. Mr. Johnson made favorable progress with Dr. Whitehill. CP 105.

On October 5, 2006, the State filed a Petition for Hearing to Determine Non-Compliance With Condition or Requirement of Sentence. CP 94-97. The petition alleged that Mr. Johnson was in violation of the terms of his suspended sentence by: 1) Failing to register as a sex offender since September 12, 2006, and 2) Residing at an unapproved address since September 12, 2006. CP 94-97. The State requested that Mr. Johnson be sentenced to up to sixty (60) days per violataion to be served either by partial or total confinement. CP 94-97.

On October 13, 2006, CCO Greg DeVorss, with the Department of Corrections, filed a Court Notice of Violation in which he alleged that in addition to the above two violations Mr. Johnson had failed to comply with sexual deviancy treatment since on or about September 12, 2006. CP 98-104. On the same date Dr. Whitehill filed a report indicating he had terminated Mr. Johnson's treatment, despite Mr.

Johnson, Xavier C.- Opening Brief COA No. 36147-7-II

Johnson's favorable progress, based on the information provided by CCO Greg DeVorss. CP 105.

On October 20, 2006, the State filed a second Petition for Hearing to Determine Non-Compliance With Condition or Requirement of Sentence in which it added a third allegation that Mr. Johnson had "failed to comply with sexual deviancy treatment since on or about September 12, 2006." CP 106-114. The State now requested that Mr. Johnson's suspended sentence be revoked pursuant to RCW 9.94A.120(7). CP 106-114.

On March 2, 2007, Mr. Johnson's case came before the trial court on the State's petition for revocation. At no time did Mr. Johnson or his counsel stipulate to any specified violations. RP 88-104. The State, the CCO, defense counsel and Mr. Johnson addressed the court, but no witnesses were sworn or examined.

Defense counsel, Mr. McNeish, advised the court that he believed Dr. Whitehill would continue to treat Mr. Johnson if an appropriate supervised residency could be secured, but that DSHS's

Johnson, Xavier C.- Opening Brief COA No. 36147-7-II

Division of Children With Developmental Disabilities (DDD) was being less than helpful. Unfortunately, Mr. McNeish was the third attorney who had represented Mr. Johnson, and the previous two attorneys had not obtained assisted living for Mr. Johnson. RP 88-91, 96-98.

CCO Greg Devorss volunteered that he was not Mr. Johnson's original counselor, and opined that Mr. Johnson should have been placed in the community protection program through DDD at the inception of his treatment. Had such placement been sought originally it would have improved Mr. Johnson's chances of acquiring the necessary supervised living arrangements. RP 91-92.

The State advocated strongly for revocation of Mr. Johnson's SSOSA sentence. RP 92-96.

The Court, while not specifically finding that Mr. Johnson had violated any of the alleged terms, ruled as follows:

The program that's been described, the community protection program certainly may be an option, but it doesn't sound like its something I can refer him to or order him into; it's got to be something where he is placed. And he

Johnson, Xavier C.- Opening Brief COA No. 36147-7-II

may be placed there by DOC as a condition of his sentence ultimately.

But I think without a current treatment program in place, I have no options other than to revoke the SSOSA sentence that was imposed and sentence him to the Department of Corrections. RP 103-104.

D. ARGUMENT

I. THE TRIAL COURT VIOLATED MR. JOHNSON'S DUE PROCESS RIGHTS AND ABUSED ITS DISCRETION WHEN IT REVOKED HIS SSOSA SENTENCE.

RCW 9.94A.670 provides a special sentencing alternative for first-time offenders as an alternative to confinement. The special sentence requires that the defendant be placed on “community custody for the length of the suspended sentence” and receive treatment for up to three years. RCW 9.94A.670(4)(b). The statute allows the sentencing court to impose specific conditions on the suspended sentence. The treatment may be extended for up to the remaining period of community custody. When it finds a violation of the conditions of the sentence or a failure to make satisfactory progress in treatment, the court may revoke the suspension under RCW

Johnson, Xavier C.- Opening Brief COA No. 36147-7-II

9.94A.670(10); State v. Badger, 64 Wn.App. 904,908-09,827 P.2d 318 (1992). Once a SSOSA is revoked, the original sentence is reinstated.

The trial court has the discretion to impose and revoke SSOSA suspended sentences. State v. Daniels, 73 Wn.App. 734,736,871 P.2d 634 (1994); Badger, 64 Wn.App at 908. In a revocation proceeding, the trial court must first find that a condition of the suspended sentence was violated and then determine the appropriate sanction. Seattle v. Lea, 36 Wn.App. 859,861,786 P.2d 798 (1990).

In a SSOSA revocation hearing, the State must “reasonably satisfy” the judge that allegations of violations are true. State v. Badger, 64 Wn.App at 908; State v. Morrison, 70 Wn.App. 593,597,855 P.2d 696 (1993). Put another way, the State has the burden to show by a preponderance of the evidence that the defendant breached the conditions of a suspended sentence. State v. Gropper, 76 Wn.App. 882,887,888 P.2d 1211 (1995).

Both federal and state constitutional provisions are implicated in SSOSA revocation proceedings. The Fourteenth Amendment of the

United States Constitution guarantees the right of due process to defendants facing revocation of parole or probation. Morrissey v. Brewer, 408 U.S. 471,482,92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (parole revocation); Gagnon v. Scarpelli, 411 U.S. 778,782,93 S.Ct. 1756,36 L.Ed 2d 858 (1973)(probation revocation). Washington courts have applied the due process rights and the procedures outlined in Morrissey and Gagnon to SSOSA revocations. State v. Dahl, 139 Wn.2d 678,683,990 P.2d 396 (1998) (citing State v. Badger, 64 Wn.App. 904,907,827 P.2d 318 (1992)).

The Morrissey Court determined that due process is required in revocation proceedings because the person's interest in continued liberty - albeit conditional - shares many of the interests of unqualified liberty, such that its termination inflicts a "grievous loss." 408 U.S. at 482. The Court also found that the State had no real interest in not providing adequate procedures before revoking an offender's conditional liberty. *Id.* at 483. Further, the Court found that society had an interest in not having revocations based on erroneous information or

Johnson, Xavier C.- Opening Brief COA No. 36147-7-II

an erroneous evaluation of whether the violations required revocation. *Id.* at 484. The Court also recognized society's interest in basic fairness because "fair treatment in . . . revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." *Id.* Thus, the Court determined that revocation required "some orderly process, however informal." *Id.* at 482.

Morrissey requires States to provide due process before revoking a person who is at liberty on conditions. At a minimum, that process includes: (a) written notice of the claimed violations; (b) disclosure to the offender of the evidence against him; (c) *an opportunity to be heard in person and to present live and documentary evidence*; (d) *the right to confront and cross-examine adverse witnesses*; (e) a neutral and detached hearing body; and (f) *a written statement by the factfinder as to the evidence relied on and the reasons for revocation.* *Id.* at 489.

As outlined in *Morrissey*, revocation hearings address two questions: (1) whether the offender has violated his or her conditions; and (2) if a violation has occurred, should the offender be committed to

prison or should other steps be taken to protect society and improve the chances that the offender will be rehabilitated. *Morrissey*, 408 U.S. at 479-80. While the first question addresses relatively simple factual determinations, the second is far more complex. *Id.* at 480. The decision of whether an offender's conduct requires revocation implicates both predictions about the ability of that person to live in society without committing antisocial acts and an exercise of the court's discretion. *Id.* Thus, that question requires the court "to know not only that some violation was committed but also to know accurately how many and how serious the violations were." *Id.* Upon this basis, the revocation hearing addresses the question of whether the facts as determined warrant revocation. *Id.* at 488. This determination, however, must also consider the offender's showing that circumstances in mitigation indicate that revocation is not warranted. *Id.*

In regard to SSOSA revocation hearings, the due process standard shares striking similarities with the abuse of discretion standard. Judicial discretion means "a sound judgment exercised with

regard to what is right under the circumstances and without doing so arbitrarily or capriciously.” State ex rel. Carroll v. Junker, 79 Wn.2d 12,26,482 P.2d 775 (1971). The court abuses its discretion when it renders a decision arbitrarily or on untenable grounds or for untenable reasons. *Id.* The “untenable grounds” analysis addresses the factual determinations underlying the decision. State v. Rohrich, 149 Wn.2d 647,654,71 P.3d 638 (2003); cf. Morrissey, 408 U.S. at 484 (revocations to be decided on verified facts). In regard to the question of whether the verified facts support the court’s exercise of discretion, the abuse of discretion standard considers a balance:

Whether this discretion is based on untenable grounds, or is manifestly unreasonable, or is arbitrarily exercised, depends upon the comparative and compelling public or private interests of those affected by the order or decision and the comparative weight of the reasons for and against the decision one way or the other.

Junker, 79 Wn.2d at 26. Thus, this question also addresses the issue of whether the verified facts - when balanced against the mitigating circumstances - support a decision to revoke. Morrissey, 408 U.S. at 479-80, 487-88. Considered in this light, an abuse of the court’s

Johnson, Xavier C.- Opening Brief COA No. 36147-7-II

discretion in a revocation proceeding also constitutes a violation of the fundamental right to due process.

In Mr. Johnson's case, the due process rights announced in *Morrissey* and *Dahl* were not adhered to. Specifically, the record does not support a contention that either a stipulation to the alleged violations occurred or that an evidentiary hearing was held in which Mr. Johnson was able to present evidence and cross-examine adverse witnesses. Moreover, no waiver of the right to an evidentiary hearing occurred. Additionally, the trial court did not specify which, if any, violations it found or the evidence relied on, or its reasons for revocation relative to any alleged violations.

Mr. Johnson's attorney spoke only to his desire to find appropriate residential placement for his client which would allow Mr. Johnson to continue and succeed in treatment with Dr. Whitehill. RP 88-91. Dr. Whitehill did not appear and was, therefore, not available for cross-examination. His report to the court, however, noted that Mr. Johnson was doing well in treatment. CP 105. His reasons for

Johnson, Xavier C.- Opening Brief COA No. 36147-7-II

terminating Mr. Johnson's treatment were based solely on information he received from CCO Greg Devorss. Mr. Devorss' negative information was directly connected to the on-going problem of Mr. Johnson's lack of suitable supervision and residency. The CCO's position was not that Mr. Johnson was failing in his overall treatment progress, but rather, that to fully comply he required twenty-four hours, seven days a week (24/7) supervision in an assisted living situation due to his developmental disabilities. RP 91-92. The trial court's only stated reason for revocation, which was verbal because no findings and conclusions were entered, was that the assisted living that was necessary to maintain the treatment program had not been arranged and the court, therefore, had no other option but to revoke. RP 103-104.

II. ALTERNATIVELY, MR. JOHNSON'S GUILTY PLEA SHOULD BE VACATED BECAUSE IT WAS ENTERED UNDER THE MISTAKEN BELIEF THAT THE STATE WOULD PROVIDE DEVELOPMENTALLY DISABLED ASSISTED LIVING WHICH WAS NECESSARY FOR MR. JOHNSON TO SUCCESSFULLY COMPLETE HIS SSOSA SENTENCE.

Johnson, Xavier C.- Opening Brief COA No. 36147-7-II

Under CrR 4.2(f), the trial court shall allow a defendant to withdraw his plea of guilty whenever it appears that withdrawal is necessary to correct a manifest injustice, i.e., an injustice that is obvious, directly observable, overt, not obscure. *State v. Taylor*, 83 Wn.2d 594,598,521 P.2d 699 (1974). In *Taylor*, the Court set forth four indicia of manifest injustice which would allow withdrawal of a guilty plea: (1) the denial of effective assistance of counsel, 2) the plea was not ratified by the defendant, (3) the plea was involuntary, and (4) the plea agreement was not honored by the prosecution. Any of the four indicia listed above would independently establish “manifest injustice” and would require a trial court to allow a defendant to withdraw his plea. *State v. Taylor*, 83 Wn.2d at 597; see also *State v. Wakefield*, 130 Wn.2d 464,472,925 P.2d 183 (1996).

Due Process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily. *State v. Ross*, 129 Wn.2d 279,284,916 P.2d 405 (1996); see also *State v. Zumwalt*, 97 Wn.App. 124,901 P.2d 319 (1995). A plea of guilty is not voluntary

Johnson, Xavier C.- Opening Brief COA No. 36147-7-II

if it is the product of or induced by coercive threat, fear, persuasion, promise or deception. State v. Swindell, 22 Wn. App. 626,630,590, P.2d 1292(1979), *affirmed* Wn.93 Wn.2d 192,607 P.2d 852 (1980).

It is the court's duty, before accepting a guilty plea, to ensure on the record that the plea is voluntary. State v. Walsh, 143 Wash. 2d 1, 5-6, 17 P.3d 591 (2001). Criminal Rule 4.2(d) provides that the trial court "shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea." The court's failure to comply fully with this rule requires that the plea be set aside. S.M., 100 Wn.App.at 413; Wood v. Morris 87 Wn. 2d 501,511,554 P.2d 1032 (1976). Moreover, "[a] defendant must understand the sentencing consequences for a guilty plea to be valid." Walsh, 143 Wn.2d at 8 (quoting State v. Miller, 110 Wn.2d 528,531,756 P.2d 122 (1988)).

A guilty plea is thus involuntary where the defendant did not understand, or was misinformed, of the direct consequences of pleading guilty. State v. Barton, 93 Wn.2d 301,305,609 P.2d 1353 (1980). As

such, when a defendant does not understand or is erroneously advised regarding the sentencing, the plea may be considered involuntary and the defendant may elect to withdraw the guilty plea. State v. Miller, 110 Wn.2d 528,531,756 P.2d 122 (1988). Acceptance of an involuntary guilty plea is a manifest constitutional error tht can be raised for the first time on appeal. State v. Walsh, Supra. at 8; RAP 2.5(a).

SSOSA eligibility is a direct sentencing consequence. State v. Adams 119 Wash.App. 373,82 P.3d (2003); State v. Kissee, 88 Wash.App. 817,947 P.2d 262 (1997). In the case at bar, although Mr. Johnson was not misadvised that he was eligible for SSOSA, he did not understand or was misinformed that for all intents and purposes he would be unable to successfully complete a SSOSA sentence unless he was provided with assisted living that offered round the clock supervision and care.

Prior to the imposition of the SSOSA sentence both the CCO and the proposed treatment provider advised the court that 24/7 residential assistance was necessary to a successful SSOSA program plan. CP 131-145. The lack of an appropriate supervised living

Johnson, Xavier C.- Opening Brief COA No. 36147-7-II

arrangement continued to be the underlying problem throughout Mr. Johnson's attempts to succeed in the SSOSA program. Due to his limited cognitive abilities Mr. Johnson could not have fully appreciated the dilemma he was placed in. His decision to forfeit all of his trial rights and plead guilty in order to complete a SSOSA treatment program was not informed or knowledgeable. In short, it was not voluntary.

E. CONCLUSION

For all of the foregoing reasons and conclusions Mr. Johnson respectfully requests that this Court reinstate his SSOSA sentence on the grounds that it was improperly revoked by the trial court. In the alternative, Mr. Johnson requests that this court vacate his guilty plea and remand for further proceedings on the grounds that his guilty plea was not voluntarily entered.

RESPECTFULLY SUBMITTED this 8th day of October, 2007.



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CERTIFICATE OF SERVICE

The undersigned certifies that on October 8, 2007, she delivered in person a copy of this Opening Brief to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Avenue South, Tacoma, Washington 98402, and delivered by U.S. mail to appellant, Xavier C. Johnson, DOC # 873239, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, Washington 98331, true and correct copies of this Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on October 8, 2007.



Norma Kinter

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OCT 8 2007
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