

NO. 36147-7-II

---

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

XAVIER CHARLES JOHNSON, APPELLANT

---

Appeal from the Superior Court of Pierce County  
The Honorable James R. Orlando

No. 04-1-02146-6

---

**BRIEF OF RESPONDENT**

---

GERALD A. HORNE  
Prosecuting Attorney

By  
P. GRACE KINGMAN  
Deputy Prosecuting Attorney  
WSB # 16717

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

    1. In a SSOSA revocation hearing, were defendant's fourteenth amendment due process rights violated where he stipulated to the violations and did not object to hearsay evidence considered by the court? (Pertains to Appellant's Assignment of Error # 1.)..... 1

    2. Did the trial court abuse its discretion in revoking defendant's SSOSA sentence where defendant had had numerous prior violations, including a felony conviction, and had (1) failed to reside at an approved residence, (2) failed to register as a sex offender, and (3) been terminated from sexual deviancy treatment for the second time? (Pertains to Appellant's Assignment of Error #1.)..... 1

    3. Should this Court consider defendant's claim that his plea was involuntary where that claim is time-barred because defendant did not file a direct appeal after entry of the judgment and sentence in 2004? (Pertains to Appellant's Assignment of Error #2.)..... 1

B. STATEMENT OF THE CASE. ....2

    1. Procedure.....2

    2. Facts .....3

C. ARGUMENT.....6

    1. DEFENDANT WAS NOT DENIED DUE PROCESS WHEN HE STIPULATED TO THE SSOSA VIOLATIONS AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT REVOKED DEFENDANT'S SSOSA SENTENCE. ....6

2. DEFENDANT’S CLAIM THAT HIS PLEA WAS INVOLUNTARY IS TIME BARRED AND SHOULD NOT BE ADDRESSED BY THIS COURT. EVEN IF NOT TIME-BARRED, THE CLAIM HAS NO MERIT ..12

D. CONCLUSION. .....18

**Table of Authorities**

**Federal Cases**

Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709,  
23 L.Ed.2d 274 (1969)..... 14

Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593,  
33 L.Ed.2d 484 (1972).....8

**State Cases**

In re Keene, 95 Wn.2d 203, 206-207, 622 P.2d 13 (1981)..... 14

In re Pers. Restraint of Stoudmire, 145 Wn.2d 258, 266,  
36 P.3d 1005 (2001) ..... 14

In re Personal Restraint of Ness, 70 Wn. App. 817, 821, 855 P.2d 1191,  
*review denied*, 123 Wn.2d 1009, 869 P.2d 1085 (1994) ..... 14

Shumway v. Payne, 136 Wn.2d 383, 399-400, 964 P.2d 349 (1998) ..... 13

State v. Badger, 64 Wn. App. 904, 908, 827 P.2d 318 (1992) ..... 7

State v. Branch, 129 Wn.2d 635, 919 P.2d 1228, (1996) ..... 14

State v. Canfield, 120 Wn. App. 729, 732, 86 P.3d 806 (2004).....7

State v. Dahl, 139 Wn.2d 678, 682, 990 P.2d 396 (1999).....6, 7, 8, 9

State v. Hays, 55 Wn. App. 13, 16, 776 P.2d 718 (1989) ..... 7

State v. Kuhn, 81 Wn.2d 648, 503 P.2d 1061 (1972).....7

State v. McCormick, \_\_\_ Wn. App. \_\_\_, 169 P.3d 508,  
paragraph 14 (2007).....7

<u>State v. Perez</u> , 33 Wn. App. 258, 261-262, 654 P.2d 708 (1982) .....	14
<u>State v. Stephan</u> , 35 Wn. App. 889, 893, 671 P.2d 780 (1983).....	14
<u>Wood v. Morris</u> , 87 Wn.2d 501, 505, 554 P.2d 1032 (1976).....	14

**Constitutional Provisions**

U.S. Const. amend. XIV .....	14
------------------------------	----

**Statutes**

RCW 10.73.090 .....	12
RCW 10.73.090(1) .....	12
RCW 10.73.090(3)(a).....	12, 13
RCW 10.73.100 .....	13
RCW 9.94A.670 .....	1
RCW 9.94A.670(10).....	7
RCW 9.94A.670(4).....	6

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. In a SSOSA<sup>1</sup> revocation hearing, were defendant's fourteenth amendment due process rights violated where he stipulated to the violations and did not object to hearsay evidence considered by the court? (Pertains to Appellant's Assignment of Error # 1.)
2. Did the trial court abuse its discretion in revoking defendant's SSOSA sentence where defendant had had numerous prior violations, including a felony conviction, and had (1) failed to reside at an approved residence, (2) failed to register as a sex offender, and (3) been terminated from sexual deviancy treatment for the second time? (Pertains to Appellant's Assignment of Error #1.)
3. Should this Court consider defendant's claim that his plea was involuntary where that claim is time-barred because defendant did not file a direct appeal after entry of the judgment and sentence in 2004? (Pertains to Appellant's Assignment of Error #2.)

---

<sup>1</sup> Special Sex Offender Sentencing Alternative. RCW 9.94A.670.

B. STATEMENT OF THE CASE.

1. Procedure

On April 30, 2004, the State charged XAVIER CHARLES JOHNSON, defendant, with three counts of second degree child rape. CP 1-3. On July 27, 2004, defendant pleaded guilty to an Amended Information charging only two counts of second degree child rape. CP 45; 7-17.

The trial court conducted a sentencing hearing on December 14, 2004. CP 21-34; RP 10. The State agreed to recommend the Special Sex Offender Sentencing Alternative if an approved evaluator found defendant amenable to treatment. CP 10, 18. In his initial evaluation, treatment provider Michael Comte recommended SSOSA, provided that defendant, who is developmentally delayed, reside in a State funded assisted/supervised living situation. RP 9-11. As it turned out, there was no funding available so that arrangement was not an option for defendant. RP 10-12. At the sentencing hearing, Comte advised the court that defendant should be given a chance to complete the SSOSA program by allowing him to reside at his grandmother's house. Id. Both defense counsel and defendant advocated this arrangement to the court. RP 10-12, 15-18. The CCO objected, recommending a standard sentence range because the assisted/supervised living situation was not available. RP 12-

13. Because defendant was amenable to treatment, the prosecutor recommended SSOSA in compliance with the plea agreement. RP 13.

The trial court found that defendant was amenable to treatment and granted his request for SSOSA. RP 18-23. Defendant did not appeal.

After many revocation hearings, the trial court revoked defendant's suspended sentence on March 2, 2007, and imposed the standard range sentence of 131 months in the Department of Corrections. CP 21-34, 117-18; RP 88-104.

Defendant filed a timely notice of appeal for review of the Order Revoking Sentence entered on March 2, 2007. CP 117-121.

## 2. Facts

On March 25, 2005, three months after sentencing, the trial court held its first revocation hearing. RP 24. The violations before the court included (1) driving without license and insurance, which resulted in a motor vehicle collision; and (2) spending the night at an unapproved residence without permission. RP 52-55. Although the court was very concerned about defendant's status, it gave defendant 30 days to get into compliance. RP 36-38.

A second revocation hearing was held just one month later on April 29, 2005. RP 39. Defendant had made no progress in treatment per a letter from Comte. RP 39; CP 58-58. Defendant's Community Corrections Officer (CCO) advised the court that defendant had not been in compliance since the sentencing hearing on December 14, 2004. RP

40-41. This hearing also resulted in the trial court giving defendant 30 more days to get into compliance. RP 45.

On June 2, 2005, the trial court conducted another revocation hearing. RP 49. Comte filed a Progress Report advising the court that it was unlikely defendant would successfully complete treatment and that they considered him at risk to re-offend. CP 59-62. Defendant's overall treatment progress rated "needs work." Id. Additionally, defendant continued to make important life decisions without permission. CP 59-62; RP 55. The trial court concluded by setting a review hearing 60 days out (early September). RP 56-57.

On July 22, 2005, the State again moved to revoke defendant's suspended sentence. 7/22/05 RP 2-4.<sup>2</sup> This time, defendant had been terminated from treatment by Comte for attempting to pay for his sexual deviancy treatment with two fraudulent checks. RP 2; CP 67. Those incidents, combined with already being on probation status, culminated in Comte terminating defendant. Id. The CCO viewed this behavior as a financial issue. RP 7. Defendant's own statements at the hearing

---

<sup>2</sup> The verbatim report of proceedings are sequentially numbered from beginning to end, with the exception of the proceedings for July 22, 2005, which are numbered page 1 through page 14. That portion of the record shall be cited as 7/22/05 RP #. All other parts of the recorded proceedings shall be RP #.

convinced the trial court that he was making a good faith effort to attend treatment sessions. RP 12. The court denied the motion to revoke and suggested finding a new treatment provider to take him. RP 12.

On October 26, 2005, Dr. Whitehill of Clinical & Forensic Psychology wrote to defense counsel that he had reviewed defendant's case and was "prepared to offer Mr. Johnson a trial period in my special-purpose SSOSA group for the intellectually and/or emotionally challenged offenders." CP 68-76. This report was filed with the court on November 4, 2005. CP 68.

On February 10, 2006, a review hearing revealed that defendant had again changed addresses without permission and that he failed to register as a sex offender at the new address. RP 59-60. He later pleaded guilty to this felony offense. RP 68-71. However, he was doing well in treatment with Dr. Whitehill, and therefore was continued on with the program. RP 60-61.

At the review hearing on September 8, 2006, defendant was still doing well in treatment per Dr. Whitehill. RP 78. However, defendant had moved residences yet again without permission. RP 79. The CCO advised the court that the new living situation was not acceptable. RP 79. The court found that overall defendant was in compliance, and set the next review hearing for March 9, 2007. RP 81.

However, on October 13, 2006, another revocation hearing was set. RP 82. This hearing was continued two times at defense counsel's

request for more time to attempt to arrange assisted/supervised living for defendant. RP 82; 85. Ultimately, he was unable to do so. RP 89.

The trial court conducted the final revocation hearing on March 2, 2007. RP 88. The allegations in the petition for revocation filed by the State were that defendant (1) failed to reside at an approved residence; (2) failed to register as a sex offender; and (3) failed to comply with treatment. CP 106-114. Dr. Whitehill reported to the court that despite what appeared to be recent progress in treatment, “[i]t appears as if Mr. Johnson’s dishonesty pertaining to his residence has been sustained and willful.” RP 94; CP 105. Dr. Whitehill terminated defendant from treatment on October 12, 2006. RP 105. The trial court revoked defendant’s suspended sentence. RP 104; CP 117-118.

C. ARGUMENT.

1. DEFENDANT WAS NOT DENIED DUE PROCESS WHEN HE STIPULATED TO THE SSOSA VIOLATIONS AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT REVOKED DEFENDANT’S SSOSA SENTENCE.

A trial court may impose a SSOSA sentence, which suspends the sentence for a first time sex offender, if the offender is proven to be amenable to treatment. RCW 9.94A.670(4); State v. Dahl, 139 Wn.2d 678, 682, 990 P.2d 396 (1999). Under a SSOSA, the offender is released into community custody and receives up to three years of inpatient or

outpatient sexual deviancy treatment. Dahl, 139 Wn.2d at 683. The court may revoke a SSOSA at any time if it is reasonably satisfied that an offender has violated a condition of his sentence or has failed to make progress in treatment. RCW 9.94A.670(10); State v. Canfield, 120 Wn. App. 729, 732, 86 P.3d 806 (2004); State v. Kuhn, 81 Wn.2d 648, 503 P.2d 1061 (1972). Revocation hearings are not criminal proceedings, and the offender is not afforded the same due process rights as those afforded at trial. Dahl, 139 Wn.2d at 683; State v. McCormick, \_\_\_ Wn.App. \_\_\_, 169 P.3d 508, paragraph 14 (2007). A finding that the violations were willful is not required. McCormick at paragraph 21.

An appellate court will not disturb the revocation of a suspended sentence absent an abuse of discretion. State v. Badger, 64 Wn. App. 904, 908, 827 P.2d 318 (1992). In order to obtain reversal of an order revoking a SSOSA sentence, defendant must show that the sentencing court's decision is "manifestly unreasonable or exercised on untenable grounds for untenable reasons." State v. Hays, 55 Wn. App. 13, 16, 776 P.2d 718 (1989). While written findings are favored by the appellate court, oral findings are permitted. Dahl at 689.

At the final revocation hearing on March 2, 2007, the prosecutor informed the court that she did not know if the defense was stipulating to the violations or if a hearing was necessary. RP 88. Defense counsel then informed the court that his focus was to try to find a suitable placement for defendant in hopes that Dr. Whitehill would then agree to take defendant

back into treatment. Id. Defense counsel stated, “My focus was not going to be really challenging what was listed as the violations, but to try to find a better placement.” RP 88-89. By affirmatively stating that he was not challenging the violations, defense counsel stipulated thereto.

After argument, the prosecutor stated, “My understanding is that the defense is stipulating to the violations.” RP 95. Defense counsel never refuted this remark, he never denied that the violations occurred, nor did he object to the treatment provider letters and CCO reports considered by the court. His strategy was to try to get another chance for defendant with “a DDD assisted living supervised situation.” RP 96. This is clearly a stipulation to the violations.

Minimal due process applies in a revocation hearing. In State v. Dahl, the Washington Supreme Court noted:

The United States Supreme Court has determined that, in the context of parole violations, minimal due process entails: (a) written notice of the claimed violations; (b) disclosure to the parolee of the evidence against him; (c) the opportunity to be heard; (d) the right to confront and cross-examine witnesses (unless there is good cause for not allowing confrontation); (e) a neutral and detached hearing body; and (f) a statement by the court as to the evidence relied upon and the reasons for the revocation. Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972). These requirements exist to ensure that the finding of a violation of a term of a suspended sentence will be based upon verified facts. Id. at 484.

Dahl, 139 Wn.2d at 683.

Here, the State filed a petition which gave defendant notice of its intention to seek revocation based on three violations: (1) failure to reside at an approved residence; (2) failure to register as a sex offender; (3) failure to comply with sexual deviancy treatment. CP 106-107. This was filed five months prior to the actual hearing. CP 1-6. Attached to the petition is the DOC court notice of violation, detailing CCO DeVorss' investigation and conclusions. RP 108-114. CCO DeVorss was present at the revocation hearing and addressed the court. RP 91-91, 96. He was available to be cross-examined. The court also considered Dr. Whitehill's letter notifying the CCO that defendant's treatment had been terminated and the reasons therefore. CP 105; RP 92-95.

Defense counsel did not object the court considering the CCO's report or the letter submitted by Dr. Whitehill. This is important for two reasons: First, as stated earlier, the defense was stipulating to the violations. Secondly, because defendant did not object below, he may not claim on appeal that he was denied his right to confront witnesses when the court considered hearsay. *See State v. Dahl*, 139 Wn.2d at 687, n. 2. Therefore, defendant was not deprived of due process at his revocation hearing.

Nor did the trial court abuse its discretion. From December 14, 2004, through October 2006, defendant was in constant violation of his conditions on suspended sentence and/or his sexual deviancy treatment rules. Devorss' investigation revealed defendant was not living with his

grandmother as approved by the CCO and treatment provider Dr. Whitehill. Rather he was living in a house that was specifically rejected as appropriate by the CCO. CP 109. In spite of his disabilities, defendant had been successfully deceiving both his CCO and Dr. Whitehill. CP 109-110. Defendant was brought before the court on violations only 3 months after sentencing. RP 24-37. In spite of the court's grave concerns, it gave defendant another chance. RP 36. Just one month later, defendant was back before the court, having made no progress in treatment, moved without permission, and was regularly late for treatment meetings. RP 39-45. The court generously gave defendant another 30 days to get into compliance. RP 45. Just two months after that, the first treatment provider, Comte, began to see that defendant was more difficult than initially anticipated. RP 53. Defendant made more significant changes in his life without permission. RP 50-54. He was considered at risk to re-offend. RP 55. Six weeks after that, defendant was terminated from treatment for non-compliance and for writing fraudulent checks as payment. 7/22/05 RP 5-12.

Defendant found a second treatment provider, Dr. Whitehill, willing to take him into treatment. RP 59; CP 68-76. On February 10, 2006, for the first time since being sentenced in December 2004, defendant was doing well in treatment. RP 60. However, he had again moved without disclosing this, and also failed to register as a sex offender at his new address. RP 59. He plead guilty to this felony offense. RP 68-

71. In September, it appeared to Dr. Whitehill that defendant was still doing well in treatment. RP 78. However, he had again moved and his living situation was not good per his CCO. RP 79-80. Shortly thereafter, defendant's willful deception was discovered by the CCO who informed Dr. Whitehill. CP 105. Defendant was then terminated from treatment for the second time in 15 months. CP 105.

A critical component to successful sex offender treatment is being open and honest with the treatment provider. CP 105. Dr. Whitehill could no longer believe that defendant was trustworthy. *Id.* Similarly, the CCO wrote in his report: "Despite his disability, Mr. Johnson has done a good job of hiding his location and his activities for several weeks. It is not possible for the Department of Corrections to adequately supervise Mr. Johnson and thereby ensure community safety if he is deceptive about his residence and his activities." CP 113. Further, the CCO told the court that even if a DDD housing situation were located for defendant, defendant would continue to get into trouble. RP 96. The current violations of failing to reside at an approved residence, failing to register as a sex offender, and failing to comply with sexual deviancy treatment are an ample basis for revocation of the SSOSA, especially in light of defendant's past performance on the program. It cannot be said that the court revoked defendant's SSOSA on untenable grounds for untenable reasons. There was no violation of due process, nor an abuse of discretion. Defendant's claim fails.

2. DEFENDANT’S CLAIM THAT HIS PLEA WAS INVOLUNTARY IS TIME BARRED AND SHOULD NOT BE ADDRESSED BY THIS COURT. EVEN IF NOT TIME-BARRED, THE CLAIM HAS NO MERIT.

RCW 10.73.090(1) provides that “[n]o petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.” RCW 10.73.090(1). When there has been no appeal, judgment becomes final on “the date it is filed with the clerk of the court.” RCW 10.73.090(3)(a). Defendant’s judgment and sentence became final on December 14, 2004. CP 21-34.

In addition to the exceptions listed within the statute, there are other specific exceptions to the one-year time limit for collateral attack: The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:

(1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;

(2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant’s conduct;

(3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, section 9 of the State Constitution;

(4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;

(5) The sentence imposed was in excess of the court's jurisdiction; or

(6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

RCW 10.73.100.

In the instant case, defendant's judgment became final on December 14, 2004, the day the judgment and sentence was filed with the clerk. RCW 10.73.090(3)(a). A timely personal restraint petition or motion to withdraw plea had to be filed by December 14, 2005. Defendant filed notice of this direct appeal on March 29, 2007, over four months too late.

Defendant bears the burden of proving that his appeal falls within an exception to the one-year time limit. Shumway v. Payne, 136 Wn.2d 383, 399-400, 964 P.2d 349 (1998); *see* RCW 10.73.100 (listing the six exceptions). To meet that burden of proof, defendant must state the applicable exception within the petition or brief. In re Stoudmire, 145

Wn.2d 258, 36 P.2d 1005 (2001)(“Stoudmire II”). Here, defendant has made no attempt to show his claim falls within an exception to the one year time limit. Therefore, this Court should hold that any challenge to the voluntariness of the plea is time-barred.

Assuming, arguendo, that the claim is not time barred, it is without merit in any event. Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. U.S. Const. amend. XIV; Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969); In re Pers. Restraint of Stoudmire, 145 Wn.2d 258, 266, 36 P.3d 1005 (2001); Wood v. Morris, 87 Wn.2d 501, 505, 554 P.2d 1032 (1976). Whether a plea is knowing, voluntary, and intelligent is determined from a totality of the circumstances. Wood, 87 Wn.2d at 506; State v. Branch, 129 Wn.2d 635, 919 P.2d 1228, (1996). If a defendant has received the information and pleads guilty pursuant to a plea agreement, there is a presumption that the plea is knowing, voluntary, and intelligent. In re Personal Restraint of Ness, 70 Wn. App. 817, 821, 855 P.2d 1191, *review denied*, 123 Wn.2d 1009, 869 P.2d 1085 (1994). “A defendant's signature on the plea form is strong evidence of a plea's voluntariness.” State v. Branch, 129 Wn.2d at 642; State v. Stephan, 35 Wn. App. 889, 893, 671 P.2d 780 (1983) (*quoting State v. Perez*, 33 Wn. App. 258, 261-262, 654 P.2d 708 (1982) (*citing In re Keene*, 95 Wn.2d 203, 206-207, 622 P.2d 13 (1981))).

In the present case, defendant's claim that he was misinformed, and therefore his plea was involuntary, is not supported by the facts in the record. Initially, both Comte, the author of the sexual deviancy evaluation, and the CCO recommended community based treatment for defendant only under the condition that he was in a supervised residence for people with development disabilities. CP 10. However, it became evident to the parties prior to sentencing that this option would not be available to defendant due to a lack of State funding. RP 10-15. Defendant's grandmother offered to have him live with her under her supervision, an arrangement advanced by Comte, defense counsel, and defendant himself. RP 10-12; 15-18. The CCO opposed this option, maintaining his recommendation for SSOSA only if defendant were in an assisted/supervised living situation. RP 12. The State continued to recommend SSOSA for defendant. RP 13. Finding defendant amenable to treatment, the court awarded defendant the SSOSA sentence, requiring that defendant reside with his grandmother. RP 18-20.

Defendant now claims that he was not informed that "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." BOA at 20-21. He claims that this lack of disclosure resulted in an involuntary plea.

This claim fails for several reasons. First, no one could guarantee whether defendant could successfully complete the program even with the assisted living situation because there are many factors that go into successful completion of this program. The underlying cause of many of the violations was the fact defendant was kicked out of treatment by two different treatment providers, as well as his own willfulness and deception.

Second, it was in that type of living situation where defendant perpetrated his original crime. RP 103.

After over two years of supervising defendant, his CCO advised the court that DOC would not be able to supervise defendant even if such a living situation were available. In other words, his failures in the program were caused more by defendant's actions and tendency to deceive than by his living situation.

Defendant's claim in hind sight that his success in the program was predicated upon that living situation is self-serving now that he has failed the program. That is a future prediction that no one could have made at the time. If it had been know for a fact that defendant could only succeed in the assisted/supervised living arrangement, the trial court would have

sentenced defendant within the standard range, and sent him straight to prison. Instead, the treatment provider backed off that requirement “advocating for Mr. Johnson to have a chance.” RP 11.

The fact that the assisted/supervised living arrangement was not going to be available to defendant became apparent to everyone prior to sentencing. Had defendant been “misinformed,” the time to move to withdraw the plea would have been at that time. Instead, defendant begged the court to let him live with his grandmother and go into treatment.

Lastly, at the time of the plea, the trial court explained to defendant that it did not have to follow anyone’s recommendation with regard to sentencing. CP 5. Defendant stated he understood that. *Id.* Defendant also signed the Statement of Defendant on Plea of Guilty which stated, “The judge does not have to follow anyone’s recommendation as to sentence.” CP 10. Thus, the trial court had authority to impose the conditions it imposed with regard to defendant’s living situation.

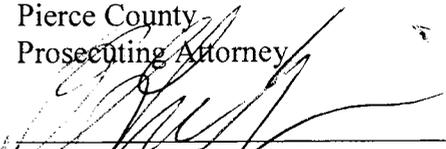
Even if not time-barred, defendant’s claim that he is entitled to withdraw his plea is without merit.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's judgment and sentence.

DATED: December 13, 2007.

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

  
P. GRACE KINGMAN  
Deputy Prosecuting Attorney  
WSB # 16717

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. 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 the date below.

12-14-07 Theresa  
Date Signature

Arnold