

No. 36843-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

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DIVISION II
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STATE OF WASHINGTON

v.

JUSTIN EDWARD TAYLOR

BRIEF OF APPELLANT

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ORIGINAL

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A. Assignment of Errors

Assignment of Errors

1. The trial court erred by admitting evidence of the first sentence modification hearing.

2. The trial court erred by considering unsworn testimony of Mr. Dennis.

3. The trial court erred by concluding that Mr. Taylor had failed to pay his legal financial obligations.

4. Mr. Taylor did not receive effective assistance of counsel when his CCO was allowed to testify without objection to unreliable hearing.

5. The trial court erred by revoking Mr. Taylor's SSOSA.

Issues Pertaining to Assignment of Errors

1. Did the trial court err by admitting evidence of the first sentence modification hearing?

2. Did the trial court err by considering unsworn testimony of Mr. Dennis?

3. Did the trial court err by concluding that Mr. Taylor had failed to pay his legal financial obligations?

4. Did Mr. Taylor receive effective assistance of counsel when his CCO was allowed to testify without objection to unreliable hearing and should the allegation of living in an unapproved residence be stricken?

5. In light of the cumulative errors, should this case be remanded to the trial court to reconsider whether revocation or a lesser sanction is the appropriate remedy?

B. Statement of Facts

Justin Taylor was charged by Information with one count of second degree child rape. CP, 1. He pled guilty to that charge on May 20, 2005. CP, 53. Although the court initially sentenced Mr. Taylor to a standard range sentence (CP, 62), the court later reconsidered and imposed a SSOSA sentence on August 4, 2005. CP, 77.

In early 2007, the State filed a motion to modify Mr. Taylor's sentence. CP, 82. On February 27, 2007, the parties agreed to a 60 day sanction for failing to report to DOC as required, failing to complete a chemical dependency evaluation, using illegal drugs on December 17, 2006, failing to notify DOC of a change of address, failing to attend sexual deviancy treatment, and leaving the county without permission. CP, 90.

On May 23, 2007, the State filed a second motion to modify the sentence. CP, 92. This time there were eight allegations: (1) Failing to report to DOC since April 11, 2007; (2) Failing to reside at an approved residence; (3) Failing to register as required; (4) Failing to make himself available for urinalysis; (5) Failing to make himself available for

polygraph testing; (6) Failing to attend sexual deviancy treatment since April 11, 2007; (7) Failing to enter chemical dependency treatment since March 21, 2007; (8) Failing to pay towards his court ordered legal obligations. CP, 92. The Court ordered a warrant for Mr. Taylor's arrest that same day. CP, 93. He was arrested on August 21, 2007 in King County. RP, 67. Because he did not have permission to be in King County, a ninth allegation was added. RP, 65.

A hearing on the motion was held on September 27, 2007. The State called four witnesses. Jamie Nyblod testified under oath. RP, 61. She is a community corrections officer. RP, 62. Ms. Nyblod testified about the circumstances surrounding the first motion to modify. RP, 64. Mr. Taylor objected to this testimony on the ground that it was previously litigated and an agreed order of 60 days was entered. RP, 64. The trial court overruled the objection saying, "I think I can consider the whole history while he's on the SSOSA sentence. I don't think I'm limited to just what has occurred since the last hearing from today." RP, 65.

Ms. Nyblod testified that Mr. Taylor, after completing his 60 day sanction, reported as required on March 1, 2007. RP, 65. At that time, she went over the conditions of the SSOSA with him for at least the second time. RP, 65. Mr. Taylor next reported on April 11, 2007. RP, 65. After April 11, Mr. Taylor stopped reporting. RP, 65. Because he was not

reporting, he was not submitting urinalysis or polygraph testing. RP, 67. Since April 11, Mr. Taylor had quit attending both sexual deviancy treatment and drug treatment. RP, 66-67. On May 1, a DOC officer went to his approved residence, but was advised by the homeowner that Mr. Taylor had not been there for a couple of weeks. RP, 67. Mr. Taylor's counsel did not object to this hearsay from the homeowner.

Ms. Nyblod testified that there was an allegation that Mr. Taylor failed to pay his legal financial obligations. RP, 67. Noticeably absent from the record is any information on when Mr. Taylor's last payment was and how much it was. Nor is there any information in this record on Mr. Taylor's financial status.

Witness Phillip Dennis did *not* testify under oath. RP, 73. He was Mr. Taylor's first sexual deviancy treatment provider. RP, 73. Mr. Dennis terminated him from treatment on January 8, 2007. RP, 74. The reason he was terminated was because he was involved in an unauthorized sexual relationship, failing to keep his journal up to date, he was visiting a home where minors were present, and tested positive for marijuana. RP, 74.

After Mr. Dennis' direct testimony, the court swore him in. RP, 74. The court did not, however, ask him to swear to the veracity of his direct testimony. On cross-examination, it was established that Mr. Dennis terminated Mr. Taylor from treatment prior to the court imposing the 60

day sanction. RP, 75. Mr. Dennis had no expectation that Mr. Taylor would return to treatment with him when he was released from custody. RP, 75.

Witness Bill Satoran testified under oath. RP, 80. Mr. Satoran is a sex offender treatment provider. RP, 81. He did an intake with Mr. Taylor to admit him into treatment on April 11, 2007. RP, 81. Mr. Taylor attended a scheduled group meeting as required on May 17, 2007. RP, 82. He did not attend any treatment sessions thereafter, however. RP, 82.

Alvin Currie testified under oath. RP, 82. Mr. Currie is a chemical dependency treatment provider. RP, 83. Mr. Currie diagnosed Mr. Taylor as needing a six month relapse prevention program. RP, 83. Mr. Taylor failed to commence the program, however. RP, 84.

The Court found that the State had proved the SSOSA violations. RP, 97. On its written order, the Court found that he had failed to successfully participate in outpatient sex offender treatment with William Storan [sic] and Phil Dennis, failed to participate in chemical dependency treatment with Alvin Currie, make payments towards financial obligations, failed to report to DOC since April 11, 2007, failed to reside at an approved address, failed to be available for urinalysis and polygraph tests since April 25, 2007. CP, 104.

The trial court's written order makes no reference to two of the allegations. CP, 104. The trial court did not find that he failed to register or went to King County without permission. CP, 104.

Prior to determining the sanction, Mr. Taylor's mother pleaded with the Court to give him "one more chance." RP, 99. The Court revoked the SSOSA sentence and sentenced Mr. Taylor to 95 months. RP, 106, CP, 106.

C. Argument

1. The trial court erred by admitting evidence of the first sentence modification hearing.

Generally, evidence of prior bad acts are not admissible to prove conformity on a particular occasion. ER 404(b). In this case, the trial court admitted over objection evidence of prior bad acts stemming from the first sentence modification proceeding. The Court made no effort to determine whether any of the exceptions from ER 404(b) apply. Before evidence is introduced under ER 404(b), the trial court must (1) find that a preponderance of evidence shows that the misconduct occurred; (2) identify the purpose for which the evidence is being introduced; (3) determine that the evidence is relevant; and (4) find that its probative value outweighs its prejudicial effect. State v. Baker, 89 Wn. App. 726,

950 P.2d 486 (1997). Given the prior agreed order modifying his sentence, there can be no argument that the prior acts were proved. But the court did not identify the purpose for admitting the evidence, determine its relevancy, or weigh its prejudicial value. This evidence was inadmissible propensity evidence and was erroneously admitted.

2. The trial court erred by considering unsworn testimony of Mr. Dennis.

A trial court may not rely on unsworn testimony in reaching its conclusions. In re M.B., 101 Wn. App. 425, 3 P.3d 780 (2000), review denied, 142 Wn.2d 1027 (2001). In this case, Mr. Dennis testified on direct examination without first being sworn. Although he was sworn prior to cross-examination, the Court made no effort to verify that the prior testimony should be deemed as under oath. The Court erred by considering Mr. Dennis' testimony.

3. The trial court erred by concluding that Mr. Taylor had failed to pay his legal financial obligations.

The trial court concluded that the State had proved Mr. Taylor failed to pay his legal financial obligations. There was no evidence before the Court as to this allegation. Although Ms. Nyblod testified that this was an allegation, she did not testify about the status of his financial obligations. RP, 67. The Court erred by finding this allegation proved.

4. Mr. Taylor did not receive effective assistance of counsel when his CCO was allowed to testify without objection to unreliable hearing.

The Sixth Amendment guarantees the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), requires Mr. Taylor to show that his counsel's performance fell below an objective reasonableness standard in light of all the circumstances and that he was prejudiced by his counsel's mistake.

One of the allegations was that Mr. Taylor had failed to notify DOC of a change of address. The evidence of this allegation was that an unnamed DOC officer went to his home, spoke to the unnamed homeowner, and learned that he had not been there for a "couple of weeks." RP, 67. Mr. Taylor's counsel did not object.

A probationer facing revocation of a SSOSA sentence is entitled to certain due process rights under the United States and Washington Constitutions. State v. Dahl, 139 Wn.2d 678, 990 P.2d 396 (1999); State v. Badger, 64 Wn. App. 904, 827 P.2d 318 (1992). Among these rights is the right to confront and cross-examine witnesses unless there is good cause for not allowing confrontation. Dahl at 683. In this case, Ms. Nyblod was allowed to testify to double hearsay: the hearsay statements of the second, unnamed DOC officer, who related the hearsay statements of the unnamed

home owner. This double hearsay violated Mr. Taylor's right to confrontation. Had a timely objection been interposed, the evidence would have been suppressed.

Mr. Taylor was prejudiced by the failure to object because the only evidence of the State's second allegation (failing to advise of a change of address) came in the form of unreliable double hearsay. Mr. Taylor did not receive effective assistance of counsel. Absent the double hearsay, there was insufficient evidence to find the second allegation.

5. The trial court erred by revoking Mr. Taylor's SSOSA.

The cumulative error doctrine applies when several errors occurred at the trial court level, but none alone warrants reversal. State v. Hodges, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). In this case, the trial court twice relied on inadmissible evidence in order to find seven of the nine allegations. Of the remaining seven allegations, there was no evidence of failing to pay towards his court order legal obligations and the trial court erroneously found that allegation was committed. One of the allegations, failing to live at an approved address, was determined based upon unreliable double hearsay and should not have been found.

Of the remaining five allegations, three of them are essentially the same: failure to report to DOC, failing to make himself available for urinalysis, and failure to make himself available for polygraph testing.

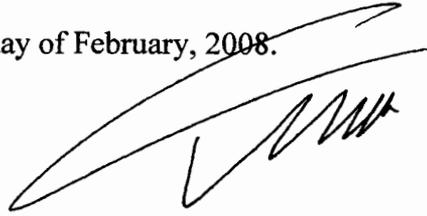
The final two allegations are similar in nature, failure to complete sex offender treatment and failure to complete chemical dependency treatment.

A trial court at a SSOSA revocation hearing has the discretion to either revoke the SSOSA or impose a sanction of up to 60 days per violation pursuant to RCW 9.94A.634(3)(c). State v. Partee, 141 Wn. App. 355, 170 P.3d 60 (2007); State v. Badger, 64 Wn. App. 904, 827 P.2d 318 (1992). Unlike the judges in Partee or Badger, the trial court in Mr. Taylor's case appear to have understood the scope of its discretion and elected to revoke the SSOSA. But the trial court was also laboring under the misconception that all of the allegations had been proved when they had not. Given the cumulative errors in this case, the proper remedy is to remand to the trial court for it to reconsider the proper sanction: revocation or 60 days per violation.

D. Conclusion

This Court should strike allegations 2 (living in an unapproved residence) and 8 (failure to pay). This Court should remand for the trial court to determine if the remaining five allegations merit revocation or some other lesser sanction.

DATED this 19th day of February, 2008.

A handwritten signature in black ink, appearing to read 'T. E. Weaver', written over a horizontal line.

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Attorney for Defendant