

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

NO. 36843-9-II

STATE OF WASHINGTON

Respondent,

vs.

JUSTIN EDWARD TAYLOR

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR JEFFERSON COUNTY
Cause Number: 04-1-00123-0

BRIEF OF RESPONDENT

JUELANNE DALZELL
Jefferson County Prosecuting Attorney
Attorney for Respondent

P.O. Box 1220
Port Townsend, WA 98368
(360) 385-9180
Date: August 21, 2008

FILED
COURT OF APPEALS
DIVISION II
08 APR 16 AM 11:48
STATE OF WASHINGTON
BY DEPUTY

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
I. Restatement of Issues Presented.....	1
II. Statement of Facts.....	1
ARGUMENT.....	7
III. Standard of Review.....	7
IV. The trial court properly admitted evidence of Mr. Taylor’s post-sentence behavior.....	8
V. The trial court correctly considered Mr. Dennis’ testimony.....	10
VI. The trial court did not err by concluding that Mr. Taylor had failed to pay his legal financial obligations.....	11
VII. Mr. Taylor received effective assistance of counsel.....	12
VIII. The trial court did not err by revoking Mr. Taylor’s SSOSA.....	14
CONCLUSION.....	16

TABLE OF AUTHORITIES

Page

CASES

Washington Supreme Court

State v. Abd-Rahmaan, 154 Wn.2d 280, 289, 111 P.3d 1157
(2005).....12, 13
State v. Dahl, 139 Wn.2d 678, 682, 990 P.2d 396 (1999)...7, 13, 14
State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007)...8
State v. Lough, 125 Wn.2d 847, 859, 889 P.2d 487 (1995).....9
State v. Vy Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)...8

Washington State Court of Appeals

State v. Badger, 64 Wn.App. 904, 908, 827 P.2d 318 (1992).....7
State v. Canfield, 120 Wn.App. 729, 732, 86 P.3d 806 (2004)....7
In Re M.B., 101 Wn.App.424, 3 P.3d 780 (2000),
review denied, 142 Wn.2d 1027 (2001).....10
State v. Smith, 85 Wn.2d 840, 849, 540 P.2d 424 (1975).....10
State v. Whittington, 27 Wn.App 422, 429, 618 P.2d 121.....10

Other Authorities

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354,
158 L.Ed.2d 177 (2004).....12
Morrissey v. Brewer 408 U.S. 471, 92 S.Ct. 2593,
33 L.Ed.2d 484 (1972).....13
Strickland v. Washington, 466 U.S. 668, 687,
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....12

Codes and Regulations

ER 404(b); Evidence Rule: Prior Bad Acts.....8
ER 11.01; Evidence Rules not applicable to hearings.....9, 11
RCW RCW 9.94A.670(3); SSOSA.....7
RCW 9.94A.670(10); SSOSA Revocation.....7

STATEMENT OF THE CASE

I. Restatement of Issues Presented

Defendant's appeal presents five issues:

1. The trial court did not err by admitting evidence of the first sentence modification hearing.
2. The trial court did not err by considering unsworn testimony of Mr. Dennis.
3. The trial court did not err by concluding that Mr. Taylor had failed to pay his legal financial obligations.
4. Mr. Taylor received effective assistance of counsel.
5. The trial court did not err by revoking Mr. Taylor's SSOSA.

II. 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. At 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. Exhibit A to the motion was a statement from the Department of Corrections detailing each allegation. CP 79. 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, WA. 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. Regarding Mr. Taylor's residence requirement failure, Ms. Nyblod's sworn statement, CP 82, was that: On May 15, 2007, Ms. Nyblod called Mr. Taylor's last given phone number, however the phone stated it would not accept incoming calls at the request of the subscriber. She then left a voice message at Mr. Taylor's last given home phone number at Ms. Brooling's. She requested he report to DOC on May 16, 2007, by 4 p.m. On May 17, 2007, with no contact

from Mr. Taylor, she spoke to provider Mr. Satoran, who said he had had no contact with Mr. Taylor. On May 17, 2007, DOC officer Tavarez went to Mr. Taylor's given address of 6040 39th Ave SW, Seattle, WA 98136, and spoke to the homeowner, Ms. Brooling. Ms. Brooling stated that Mr. Taylor had not been there in about 2 weeks.

During Ms. Nyblod's testimony she described this search for Mr. Taylor. RP 67. Mr. Taylor's counsel did not object to this testimony.

Ms. Nyblod testified that Mr. Taylor failed to pay his legal financial obligations. RP 67. The court had been given a statement of violations signed under penalty of perjury by Ms. Jami Nyblod dated May 17, 2007. CP 79. The statement showed that Mr. Taylor had last made a minimum payment on Dec. 1, 2006, and that he currently owed \$3,471. It was incorporated into the state's Motion for Order Authorizing Arrest Warrant as Exhibit A. CP 76. Ms. Nyblod testified in open court to these violations. RP 62. Mr. Taylor's attorney cross-examined Ms. Nyblod. RP 68. The Court found Mr. Taylor failed to meet his financial obligations. CP 74.

The trial court failed to swear in witness Phillip Dennis before his testimony. Mr. Taylor made no objection. RP 73. During direct examination Mr. Dennis testified that his job was to treat sex

offenders; Mr. Taylor started treatment with him on April 7, 2006; Mr. Taylor was terminated from treatment on January 8, 2007, for failing to show up for a treatment session on December 15, 2006, for failing to report sexual activities, and for using marijuana. RP 73-74.

After Mr. Dennis' direct testimony, the court swore him in. RP 74. Mr. Taylor's attorney then cross-examined Mr. Dennis. RP 75-79. The prosecutor asked one question in re-direct, and the witness was excused. RP 80.

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, a chemical dependency treatment provider, testified under oath. RP 82. Mr. Currie diagnosed Mr. Taylor as

needing a six month relapse prevention program. RP 83. Mr. Taylor failed to commence the program. 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; to participate in chemical dependency treatment with Alvin Currie; to make payments towards financial obligations; to report to DOC since April 11, 2007; to reside at an approved address; to be available for urinalysis and polygraph tests since April 25, 2007. CP 104.

The trial Court revoked the SSOSA sentence and sentenced Mr. Taylor to 95 months. RP 106.

Argument

III. Standard of Review

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(3); *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 reasonably believes 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). We 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).

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.

IV. The trial court properly admitted evidence of Mr. Taylor's post-sentence behavior

Mr. Taylor asserts that the court, while reviewing alleged SSOSA violations, impermissibly considered evidence of prior bad acts stemming from the first sentence modification proceeding, contrary to ER 404(b).

Generally, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conforming with it. ER 404(b). It may be admissible for other purposes, such as proof of motive, intent, or res gestae, but before a trial court may admit such evidence, it must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). "ER 404(b) is not designed 'to deprive the State of relevant evidence necessary to establish an essential element of its case,' but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged." *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (quoting

State v. Lough, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)).

However, in this case ER 404(b) is not applicable. The issue before the court is a request from DOC to revoke the SSOSA order because of **ALL** the bad acts Mr. Taylor had done contrary to SSOSA. Mr. Taylor was originally sentenced to prison in May, 2005. The court changed its mind and imposed a SSOSA sentence in August 2005. The bad acts cited by Mr. Taylor resulted in a 60 day sanction in February 2007. The state asked the court to rescind the SSOSA contract in May 2007, citing another eight violations of the SSOSA contract. The motion to rescind was not based on any violation or set of violations, but rather on Mr. Taylor's continued inability to adhere to the contract. The earlier violations were not "prior bad acts" subject to ER 404(b), but were just the first demonstrations of Mr. Taylor's inability to adhere to SSOSA. The trial court was fully justified in considering everything Mr. Taylor had done in violation of SSOSA when considering whether to terminate the SSOSA.

In addition, the rules of evidence do not apply to SSOSA revocation hearings per ER 11.01.

The trial court properly admitted evidence of all of Mr. Taylor's SSOSA activities and his motion should be denied.

V. The trial court correctly considered Mr. Dennis' testimony

Mr. Taylor argues that the trial court erred by initially failing to swear Mr. Dennis in before his testimony.

A trial court may not rely on unsworn testimony in reaching its conclusions. *In Re M.B.*, 101 Wn.App.424, 3 P.3d 780 (2000), review denied, 142 Wn.2d 1027 (2001). The defendant must be afforded the constitutional rights to confrontation and cross examination of witnesses. Two factors should be considered when deciding if hearsay is admissible under the confrontation clause:“(1) reliability of the testimony sought to be admitted, and (2) availability of the source to appear, swear, and be cross-examined.” *State v. Whittington*, 27 Wn.App 422, 429, 618 P.2d 121 (quoting *State v. Smith*, 85 Wn.2d 840, 849, 540 P.2d 424 (1975)).

In this case, Mr. Dennis testified on direct examination without first being sworn, the trial court realized its mistake and swore in Mr. Dennis before cross-examination began. There was no objection made. Here the error was harmless because Mr. Taylor did, in fact, confront Mr. Dennis and the testimony given was not critical to the court's decision.

Additionally, the rules of evidence do not apply to SSOSA revocation hearings per ER 11.01.

The trial court did not err by considering Mr. Dennis' testimony.

VI. The trial court did not err by concluding that Mr. Taylor had failed to pay his legal financial obligations.

Mr. Taylor asserts that the trial court erred in finding he had not fulfilled his financial obligations because Ms. Nyblod did not testify as to the details of his failures.

The court had been given a statement of violations signed under penalty of perjury by Ms. Jami Nyblod dated May 17, 2007. CP 79. It was incorporated into the state's Motion for Order Authorizing Arrest Warrant as Exhibit A. CP 76. Ms. Nyblod testified in open court to these violations. RP 62. Mr. Taylor's attorney cross-examined Ms. Nyblod. RP 68. The Court properly found Mr. Taylor failed to meet his financial obligations. CP 74.

In addition, the rules of evidence do not apply to SSOSA revocation hearings per ER 11.01.

The trial court did not err by finding this allegation true.

VII. Mr. Taylor received effective assistance of counsel.

Mr. Taylor argues that; first, the court relied on unreliable hearsay testimony to revoke his SSOSA and thus, under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), his Sixth Amendment right to confrontation was violated; and, second, that he did not receive effective counsel when his attorney failed to object.

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.

In *Crawford*, the United States Supreme Court ruled that the confrontation clause bars the admission of testimonial hearsay statements made by a non-testifying witness unless the hearsay declarant is unavailable and the defendant had prior opportunity to cross-examine the declarant. 541 U.S. at 68.

In *State v. Abd-Rahmaan*, our Supreme Court addressed the applicability of *Crawford* to SSOSA revocation hearings and held

that *Crawford* does not apply to sentence modification hearings because the 'minimal due process right to confront and cross-examine witnesses is not absolute.' 154 Wn.2d 280, 289, 111 P.3d 1157 (2005) (quoting Dahl, 139 Wn.2d at 686). The court observed that *Morrissey v. Brewer* 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). established Fourteenth Amendment rights to due process in parole revocation hearings, but it did not guarantee the Sixth Amendment right of confrontation in such hearings. *Abd-Rahmaan*, 154 Wn.2d at 288.

Thus, *Crawford* does not apply to SSOSA revocation hearings and the trial court did not err when it admitted hearsay statements at Mr. Taylor's hearing.

Additionally, the rules of evidence do not apply to SSOSA revocation hearings per ER 11.01.

Mr. Taylor asserts that when Ms. Nyblod testified to the State's second allegation (failing to advise of a change of address) describing another DOC officer's contact with Mr. Taylor's landlady, this was impermissible hearsay.

In this case there was no right of confrontation and use of hearsay was permissible therefore, Mr. Taylor's counsel correctly did not object. Mr. Taylor's counsel was effective and this motion should be denied.

VIII. The trial court did not err by revoking Mr. Taylor's SSOSA.

Mr. Taylor asserts the trial court erred when it revoked his SSOSA.

Dahl states: 'An offender's SSOSA may be revoked at any time if a court is reasonably satisfied that an offender has violated a condition of his suspended sentence or failed to make satisfactory progress in treatment.' *State v. Dahl*, 139 Wn.2d 678, 682, 990 P.2d 396 (1999) (emphasis added). Thus the appropriate standard of review is the 'reasonably satisfied' standard.

Here, it appears that the court applied the 'reasonably satisfied' standard and revoked the SSOSA. In its oral decision, the court stated:

[You] didn't take advantage of the opportunity that you were sentenced to, and didn't take advantage of it not on one occasion, but, on the second occasion and, in fact, even originally when you were charged, when you ended up being charged with bail jumping, too. You had been working. I mean, maybe you couldn't make a payment, although I didn't hear anything about that from the sexual deviancy treatment provider or the alcohol treatment provider. They didn't say they terminated you because you couldn't pay.

...You had the opportunity. They didn't say anything like that. And, your new significant other said you were working the whole time, 40 hours a week. The whole time. And, ... that is the one thing you've

got to pay. I mean, it's the one thing you've got to do. The system didn't fail. You didn't take advantage of what was offered to you, to stay out of prison. And, I didn't want to send you to prison, uh, at this juncture. I certainly didn't. But, when I listen to this, ...you're an untreated sex offender. Whether you believe it or not. You are an untreated sex offender who is likely, according to everything, is likely to re—offend if you use controlled substances, or alcohol. You've been doing both, using controlled substances and alcohol, you tested positive for marijuana and your significant other says you had drinks with her. I don't know how much drinks you had, but, um, you're going right back to what got you here to begin with. I don't have any choice in your case, I don't believe, Mr. Taylor. I'm going to revoke the SSOSA. RP 105-106

The trial court properly applied the correct standard and the SSOSA revocation was valid.

CONCLUSION

The State respectfully requests that this Court affirm Appellant's sentence as determined by the trial court and that Appellant be ordered to pay costs, including attorney fees, pursuant to RAP 14.3, 18.1 and RCW 10.73.

Respectfully submitted this 15th day of April, 2008

JUELANNE DALZELL, Jefferson County
Prosecuting Attorney



By: Thomas A. Brotherton, WSBA # 37624
Deputy Prosecuting Attorney

08 APR 16 AM 11:46

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

STATE OF WASHINGTON,
Respondent,

vs.

JUSTIN EDWARD TAYLOR,
Appellant.

Case No.: 36843-9-II
Superior Court No.: 04-1-00123-0

DECLARATION OF MAILING

BY _____
DEPUTY

Janice N. Chadbourne declares:

That at all times mentioned herein I was over 18 years of age and a citizen of the United States; that on the 15th day of April, 2008, I mailed, postage prepaid, a copy of the State's Brief of Respondent to the following:

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Thomas Weaver
Law Office of Thomas Weaver
P.O. Box 1056
Bremerton, WA 98337

Justin Edward Taylor, DOC #833577
Appellant
Washington State Penitentiary
1313 N. 13th Avenue
Walla Walla, WA 99362

I declare under penalty of perjury under the laws of the State of Washington that the foregoing declaration is true and correct.

Dated this 15th day of April, 2008, at Port Townsend, Washington.


Janice N. Chadbourne
Legal Assistant

DECLARATION OF MAILING
Page 1

JUELANNE DALZELL
PROSECUTING ATTORNEY
FOR JEFFERSON COUNTY
Courthouse -- P.O. Box 1220
Port Townsend, WA 98368
(360) 385-9180