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COURT OF APPEALS  
DIVISION II

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NO. 38625-9-II

STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

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

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STATE OF WASHINGTON,

Respondent,

v.

ANTHONY THOMAS MALM,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Stephanie A. Arend

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court denied appellant his due process right to confront witnesses at his SSOSA revocation hearing.

2. The trial court erred in failing to enter written findings for the basis of its decision to revoke appellant's SSOSA sentence.

3. The trial court erred in failing to consider sanctions under the probation violation statute as an option to revocation of appellant's SSOSA sentence based on its erroneous belief that revocation was its only option.

Issues Pertaining to Assignments of Error

1. Is a remand for a new hearing required where the trial court relied on hearsay testimony at appellant's revocation hearing in violation of his due process right to confront the witnesses against him?

2. Is a remand for a new hearing required where the trial court failed to consider sanctions under the probation violation statute as an option to revocation of appellant's SSOSA sentence based on its erroneous belief that revocation was its only option?

B. STATEMENT OF THE CASE<sup>1</sup>

On July 1, 2004, the State charged appellant, Anthony Thomas Malm, with two counts of child molestation in the second degree. CP 1-4; RCW 9A.44.086. Malm pled guilty to both counts on September 30, 2004, based on the State's recommendation to sentence Malm under the Special Sexual Offender Sentencing Alternative (SSOSA) if he met the requirements. CP 5-16; RP 09/30/04, 3-11. On December 10, 2004, the court imposed a SSOSA sentence and suspended Malm's sentence of 41 months in confinement, placed him on community custody, ordered sex offender treatment for three years, and set a treatment termination hearing for September 14, 2007. CP 25-26; RP 12/10/04, 9-12.

At a review hearing on July 27, 2007, the State raised concerns regarding Malm's lack of progress in treatment and "put the Court and counsel on notice" that "unless something changes significantly, I suspect the State will be asking for revocation at the next hearing because I'm very concerned that we're not going to have jurisdiction to do anything very soon." RP 07/27/07, 3-4. Defense counsel informed the court that Malm "intends to re-double his efforts in treatment," stating "I don't think we're going to wrap this thing up on September 14<sup>th</sup>. So I'll be looking

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<sup>1</sup> There is one volume of verbatim report of proceedings. The proceedings are referenced by the date and page number.

into having Mr. Malm, perhaps, stipulate to an additional year of probation.” RP 07/27/07, 5. The court set a review hearing for August 10, 2007. RP 07/27/07, 6-7; Supp CP \_\_\_\_ (Scheduling Order, 07/27/07).

On August 10, 2007, the State moved to revoke Malm’s suspended sentence based on a “rather disturbing report” from Malm’s treatment provider. RP 08/10/07, 3-4. Defense counsel proposed resetting the review hearing to have the treatment provider appear before the court. RP 08/10/07, 3-4, 7. The court ordered a review hearing for September 14, 2007, ruling that it would “not deny the request to revoke, but I’m going to sort of hold it in abeyance, if you will, so that I can hear from the treatment provider.” RP 08/10/07, 7-8; Supp CP \_\_\_\_ (Scheduling Order, 08/10/07).

On September 14, 2007, Malm’s treatment provider, Robert Macy testified that Malm was “attending all the groups, participating well” in treatment. RP 09/14/07, 7. Macy believed that Malm could successfully complete treatment in 12 to 18 months. RP 09/14/07, 11-12. The State renewed its motion for revocation pointing out that Macy’s 12 to 18 month forecast for completing treatment would extend beyond the time that the court maintains jurisdiction. RP 09/14/07, 17. Defense counsel calculated that the court has jurisdiction for the length of the suspended sentence which was 41 months from the sentencing date of December 10,

2004, “I would suggest that you keep him on a very short leash and set a hearing within the 41 months to allay any fears of running out of jurisdiction.” RP 09/14/07, 16-17. The court recognized that because Malm “appears to be doing what he’s doing, I always think that’s not necessarily the time to then revoke the SSOSA and send him to prison. So it seems to me that the appropriate action is to set a relatively short review period.” RP 09/14/07, 17-18. The court directed Macy to provide his November quarterly report to the court upon completion and ordered a review hearing for December 14, 2007. RP 09/14/07, 18-19; Supp CP \_\_\_\_ (Scheduling Order, 09/14/07).

On December 14, 2007, the court acknowledged that it received a letter from Macy dated November 12, 2007 indicating that Malm “has basically now come into compliance and that they are willing to continue to see him in treatment” and that he could successfully complete treatment within one or two years. RP 12/14/07, 3-4. The State contended that the court has jurisdiction for three years from the date of sentencing on December 10, 2004 so the only options available to the court were to revoke Malm’s SSOSA or terminate community custody. RP 12/14/07, 5-6. Defense counsel asserted that the court retains jurisdiction for 41 months from the date of sentencing and requested that the court allow the parties to research and brief the issue of jurisdiction. RP 12/14/07, 8-9.

Noting that Macy has determined that Malm's "prospects are good," the court set a review hearing for January 25, 2008 and ordered the parties to provide briefing on whether the court has "jurisdiction or not." The court clarified that these review hearings have been continuances of a revocation hearing dating back to July 2007. RP 12/14/07, 10-13; Supp CP \_\_\_\_ (Scheduling Order, 12/14/07).

On January 10, 2008, defense counsel filed a motion to modify the judgment and sentence to extend Malm's treatment and community custody for a year until December 10, 2008. Supp CP \_\_\_\_ (Motion to Modify, 01/10/08). The court considered the motion on January 25, 2008 and entered an order stating that the "defendant stipulates that the Court's jurisdiction in this case is valid through December 10, 2008." CP 98. The court set a SSOSA revocation hearing for March 13, 2008, ordering Macy to appear to address Malm's progress in treatment. RP 01/25/08, 4-5; Supp CP \_\_\_\_ (Scheduling Order, 01/25/08).

On March 28, 2008, Macy informed the court that he referred Malm to a psychiatrist and that Malm was responding well to medication and undergoing additional treatment, "I'm very pleased with the progress." Macy asked the court to allow Malm to visit with his children under the supervision of his wife. RP 03/28/08, 4-6. The court ordered visitation pursuant to CCO and treatment provider approval and set a

review hearing for October 10, 2008. RP 03/28/08; Supp CP \_\_\_\_ (Scheduling Order, 03/28/08).

On September 25, 2008, the State filed a petition for a revocation hearing, alleging that Malm had failed to stay in compliance with his sex offender treatment. Supp CP \_\_\_\_ (Petition for Hearing, 09/25/08). On October 8, 2008, the court entered an order authorizing substitution of counsel, allowing defense counsel Edward DeCosta to withdraw and confirming Robert Quillian as Malm's new counsel. Supp CP \_\_\_\_ (Order Authorizing Substitution of Counsel, 10/08/08).

On November 12, 2008, defense counsel filed a motion "objecting to and challenging the court's jurisdiction" to revoke Malm's SSOSA sentence. Supp CP \_\_\_\_ (Motion Re: Jurisdiction, 11/12/08). The court heard argument at a revocation hearing held on November 14, 2008. Defense counsel argued that under the statutes governing SSOSA, the court's jurisdiction terminated on December 9, 2007, three years from the date of Malm's sentencing, and the court had no authority to extend the term of community custody and treatment beyond three years. He argued further that even if the court could extend community custody and treatment, a violation of the conditions could only be punishable by contempt of court and not revocation of the suspended sentence. RP 11/12/08, 4-10. The State argued that Malm stipulated that the court had

jurisdiction until December 2008 and that the judgment and sentence, which had never been challenged, places Malm on community custody for up to four years and states that the court may revoke the suspended sentence at any time during the period of community custody. RP 11/12/08, 10-11. Upon finding that it maintained jurisdiction, the court heard from Malm and his corrections officer who testified that according to Macy, Malm was regressing in treatment. RP 11/12/08, 15-16, 17-18, 20-22. Thereafter, the State moved to revoke Malm's suspended sentence. RP 11/12/08, 18. Concluding that it had "time to do one of two things, either release Mr. Malm from any further obligation or revoke his SSOSA and send him to prison, the court revoked Malm's suspended sentence. RP 11/12/08, 22; CP 117-19.

Malm filed this timely appeal. CP 134-37.

C. ARGUMENT

A REMAND FOR A NEW HEARING IS REQUIRED BECAUSE THE TRIAL COURT DENIED MALM HIS DUE PROCESS RIGHT TO CONFRONT WITNESSES AGAINST HIM AND THE TRIAL COURT ERRED IN FAILING TO CONSIDER SANCTIONS UNDER THE PROBATION VIOLATION STATUTE AS AN OPTION TO REVOCATION OF MALM'S SSOSA SENTENCE.

Remand is required because the trial court relied on hearsay, denying Malm his due process right to confront witnesses at his SSOSA revocation hearing and the court erred in failing to consider sanctions

under the probation violation statute as an option to revocation of Malm's SSOSA sentence based on its erroneous belief that revocation was its only option.

Malm was sentenced under the Special Sex Offender Sentencing Alternative (SSOSA), former RCW 9.94A.670, which allows the trial court to suspend the sentence for first-time sex offenders and impose conditions upon the offenders. The conditions included placing "the offender on community custody for the length of the suspended sentence" or "three years, whichever is greater" and ordering "treatment for any period up to three years in duration." RCW 9.94A.670(4)(a)(b). The trial court could revoke the suspended sentence at any time during the period of community custody and order execution of the sentence if: (a) The offender violates the conditions of the suspended sentence, or (b) the court finds that the offender is failing to make satisfactory progress in treatment. RCW 9.94A.670(10). The trial court retains jurisdiction to hold a revocation hearing if a summons for a review hearing to review the conditions of the SSOSA sentence is filed during the period of community custody. State v. Beer, 93 Wn. App. 539, 545, 969 P.2d 506 (1999).

a. The Trial Court Violated Malm's Due Process Right to Confront Witnesses Against Him.

An offender facing revocation of a suspended sentence has minimal due process rights. State v. Nelson, 103 Wn.2d 760, 762-63, 697 P.2d 579 (1985)(citing Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972); Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973)). These rights include the right to confrontation unless good cause to deny it is specifically found and a written finding as to the evidence relied on and reasons for the revocation of probation or parole. State v. Badger, 64 Wn. App. 904, 907, 827 P.2d 318 (1992). Hearsay evidence should be considered only if there is good cause to forgo live testimony. State v. Dahl, 139 Wn.2d 678, 686, 990 P.2d 396 (1999). Good cause is defined in terms of “difficulty and expense of procuring witnesses in combination with ‘demonstrably reliable’ or ‘clearly reliable’ evidence.” Id. citing Nelson, 103 Wn.2d at 765.

Here, upon the State's motion to revoke Malm's SSOSA sentence, the court heard from Malm's corrections officer, Jason Fiman. RP 11/14/08, 16-17. Fiman informed the court that Malm's treatment provider, Bob Macy, contacted him on September 24, 2008. Macy “believed that Malm was not safe to be in the community” and presented

him with a progress report citing several concerns. RP 11/14/08, 17-18. Macy said that Malm “does not seem to be gaining from his treatment” and Malm should enroll in a treatment program while incarcerated to protect the community. RP 11/14/08, 18.

Defense counsel asserted that he “could not sit here and argue with Mr. Macy when he’s not here.” RP 11/14/08, 19. Malm responded that “Mr. Macy testified within this court in March that everything was moving along so much better” and “this flip around that Mr. Macy has done again, I don’t understand.” RP 11/14/08, 20. Malm pointed out that without any explanation, Macy changed the conditions of the testing that he administered for Malm’s July and September progress reports. RP 11/14/08, 21.

The trial court found it “very disconcerting” that according to Macy, Malm continued to “show arousal to minors” and have “sexual dreams about minors.” RP 11/14/08, 21. Concluding that Malm “has not benefited from treatment” and to release him into society “is a risk for young children,” the court revoked Malm’s SSOSA sentence. RP 11/14/08, 22. The court entered an order revoking the 41 month suspended sentence but did not articulate the factual basis of its decision. CP 117-19.

The record reflects that the court relied on hearsay evidence provided by Fiman without first determining that good cause existed to do so. In any event, the court's reliance on the hearsay evidence fails both prongs of the good cause standard under Nelson. First, it obviously would not have been difficult to procure the live testimony of Macy because he had testified at previous review hearings at the court's request. Second, it is evident that Macy's report was not clearly reliable because the record reflects that Macy had inexplicably changed his opinion about Malm's progress in treatment several times.

In light of the fact that Malm was facing revocation, he had a due process right to confront Macy about the inconsistencies in his reports. Furthermore, due process requires that courts articulate the factual basis for a decision to revoke a SSOSA sentence. Accordingly, remand is required for the court to conduct a new hearing and enter written findings for its decision. Dahl, 139 Wn.2d at 686-690.

b. The Trial Court Erred in Failing to Consider Sanctions under the Probation Violation Statute as an Option to Revocation of Malm's SSOSA Sentence.

The probation violation statute, RCW 9.94A.634, provides in pertinent part:

- (1) If an offender violates any condition or requirement of a sentence, the court may modify its order of judgment and

sentence and impose further punishment in accordance with this section.

....

(3) If an offender fails to comply with any of the requirements or conditions of a sentence the following provisions apply:

....

(c) The state has the burden of showing noncompliance by a preponderance of evidence. If the court finds that the violation has occurred, it may order the offender to be confined for a period not to exceed 60 days for each violation, and may (i) convert a term of partial confinement to total confinement, (ii) convert community restitution obligation to total or partial confinement, (iii) convert monetary obligations, except restitution and the crime victim penalty assessment, to community restitution hours at the rate of the state minimum wage as established in RCW 49.46.020 for each hour of community restitution, or (iv) order one or more of the penalties authorized in (a)(i) of this subsection. Any time served in confinement awaiting a hearing on noncompliance shall be credited against any confinement order by the court.

Sentencing courts have discretion to sanction violations of a SSOSA condition either as a probation violation or by revoking the SSOSA sentence. State v. Partee, 141 Wn. App. 355, 362-63, 170 P.3d 60 (2007)(citing Badger; 64 Wn. App. at 910; State v. Daniels, 73 Wn. App. 734, 736-37, 871 P.2d 634 (1994); State v. Canfield, 120 Wn. App. 729, 733, 86 P.3d 806 (2004), reversed on other grounds, 154 Wn.2d 698, 116 P.3d 391 (2005).

Here, the State argued that “the defendant’s not making satisfactory progress in treatment and is not safe to be in the community and, therefore, [the State] is asking to revoke the SSOSA.” RP 11/14/08, 18. Defense counsel argued that revocation was not the only alternative, “there’s some other treatment we could propose that might benefit the community more than simply revoking the suspended sentence, and I would like an opportunity to try to present that.” RP 11/14/08, 18-19. Despite defense counsel’s assertion that revocation was not the only remaining option, the court concluded otherwise and revoked Malm’s SSOSA sentence:

It seems to me that the Court has time to do one of two things, either release Mr. Malm from any further obligations or revoke his SSOSA and send him to prison. It seems to me those are my only two options given the time frame we’re under and given that he apparently is still continuing to be aroused.

RP 11/14/08, 22.

“[I]t may be an abuse of discretion where, in selecting one particular sentencing option, the court erroneously believes that its alternatives are limited such that it fails to consider other legally available options.” Partee, 41 Wn. App. at 361-62. As in Partee and Badger, the record reflects that the trial court failed to consider sanctions under the probation violation statute as an option to revocation based on its

erroneous belief that revocation was its only viable option. Consequently, a remand is required for the trial court to exercise its discretion in deciding whether to adhere to its previous revocation of Malm's SSOSA sentence or to impose a sanction authorized under RCW 9.94A.634. Partee, 41 Wn. App. at 362-63; Badger, 64 Wn. App. at 910.

D. CONCLUSION

For the reasons stated, this Court should remand to the trial court for a new hearing.

DATED this 15<sup>th</sup> day of July, 2009.

Respectfully submitted,

  
VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, Anthony Thomas Malm

**DECLARATION OF SERVICE**

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Anthony Thomas Malm, DOC # 875389, H1 B121, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, Washington 98520.

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

DATED this 15<sup>th</sup> day of July, 2009 in Kent, Washington.



Valerie Marushige  
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