

NO. 38625-9-II

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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STATE OF WASHINGTON  
BY                       
DEPUTY  
COURT OF APPEALS  
DIVISION II

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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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REPLY BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
A. <u>ARGUMENT IN REPLY</u> .....	1
1. A REMAND FOR A NEW HEARING IS REQUIRED BECAUSE THE TRIAL COURT VIOLATED MALM’S DUE PROCESS RIGHT TO CONFRONT WITNESSES AT HIS SSOSA REVOCATION HEARING. ....	1
2. A REMAND FOR A NEW HEARING IS REQUIRED BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO CONSIDER SANCTIONS UNDER THE PROBATION VIOLATION STATUTE AS AN OPTION TO REVOCATION BASED ON ITS MISTAKEN BELIEF THAT REVOCATION WAS THE ONLY ALTERNATIVE .....	2
B. <u>CONCLUSION</u> .....	4

**TABLE OF AUTHORITIES**

	Page
 <u>WASHINGTON CASES</u>	
<u>State v. Badger</u> , 64 Wn. App. 904, 827 P.2d 318 (1992) .....	2
<u>State v. Dahl</u> , 139 Wn.2d 678, 990 P.2d 396 (1999) .....	1
<u>State v. Nelson</u> , 103 Wn.2d 760, 697 P.2d 579 (1985) .....	1
<u>State v. Partee</u> , 141 Wn. App. 355, 170 P.3d 60 (2007) .....	4
 <u>RULES, STATUTES, OTHERS</u>	
RCW 9.94A.634 .....	2, 4

A. ARGUMENT IN REPLY

1. A REMAND FOR A NEW HEARING IS REQUIRED BECAUSE THE TRIAL COURT VIOLATED MALM'S DUE PROCESS RIGHT TO CONFRONT WITNESSES AT HIS SSOSA REVOCATION HEARING.

The State argues that Malm may not claim on appeal that the trial court denied him his due process right to confront witnesses because Malm did not object when the court considered hearsay. Brief of Respondent at 7. To the contrary, the record reflects that defense counsel did object during the court's consideration of Dr. Macy's reports. Defense counsel stated, "I guess what I'm saying, Your Honor, is and I'm -- I can't sit here and argue with Mr. Macy when he's not here. . . ." RP 11/14/08, 18. The court therefore erred in relying on hearsay evidence without first determining whether good cause existed to do so, as required under State v. Dahl, 139 Wn.2d 678, 686, 990 P.2d 396 (1999) and State v. Nelson, 103 Wn.2d 760, 765, 697 P.2d 579 (1985). See Brief of Appellant at 9-11.

The State argues further that Malm waived his right of confrontation because he referred to Dr. Macy's reports to argue that he was successfully complying with treatment requirements. Brief of Respondent at 7-8 (citing Dahl quoting Nelson). Unlike in Dahl, Malm was responding to the court's reference to Macy's reports. RP 11/14/08, 20-21. When the court proceeded to rely on Macy's reports, Malm

obviously felt compelled to emphasize that his reports were contradictory and inconsistent. Consequently, contrary to the State's assertion, Malm's explanation of Macy's reports does not constitute a waiver.

A remand for a new hearing is required because the trial court violated Malm's right to due process, which includes the right to confrontation and written findings as to the evidence relied on and reasons for revocation. State v. Badger, 64 Wn. App. 904, 907, 827 P.2d 318 (1992).

2. A REMAND FOR A NEW HEARING IS REQUIRED BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO CONSIDER SANCTIONS UNDER THE PROBATION VIOLATION STATUTE AS AN OPTION TO REVOCATION BASED ON ITS MISTAKEN BELIEF THAT REVOCATION WAS THE ONLY ALTERNATIVE.

The State concedes that a trial court has the discretion to sanction SSOSA violations as a probation violation under former RCW 9.94A.634 but argues that "[t]here is no evidence the court did not consider the 60-day confinement period." Brief of Respondent at 12-13. The record belies the State's argument. Without any consideration of the imposition of sanctions rather than revocation, the court clearly stated that it had only two options, "either release Mr. Malm from any further obligations or revoke his SSOSA and send him to prison." RP 11/14/08, 22. It is indisputable that the court mistakenly believed that other than release,

revocation was its only option, unaware that it had the authority to impose up to 60 days in confinement as a sanction in lieu of revocation.

The State expands its argument, asserting that even if the court “did not consider the 60-day confinement period, all the evidence suggests the court would have rejected the option given the defendant’s situation.” Brief of Respondent at 13. The State claims that when defense counsel suggested another form of treatment rather than revocation, “the court felt immediate action, more severe than continued treatment, was needed to protect the community from the defendant.” Brief of Respondent at 12. The record reflects otherwise. Defense counsel asked the court for an opportunity to present some other treatment “that might benefit the community more than simply revoking the suspended sentence.” RP 11/14/08, 19. The court responded that because it would lose jurisdiction in a couple of weeks “you, know, I don’t know that there’s the time to present or consider any alternatives is the problem.” RP 11/14/08, 19-20. The court reiterated, “So I don’t think that, you know, alternative treatment options, that the Court has really any time.” RP 11/14/08, 22. It is apparent that the court reluctantly declined to consider an alternative treatment proposal due to jurisdiction, which does not lead to the conclusion that the court would have refused to consider imposing sanctions under the probation statute if it knew it had the authority to do so.

As in State v. Partee, 141 Wn. App. 355, 362-63, 170 P.3d 60 (2007), a remand is required for the court to exercise its discretion in deciding whether to adhere to its previous revocation of Malm's SSOSA sentence in light of its authority to impose sanctions under former RCW 9.94A.634.

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should remand to the trial court for a new hearing.

DATED this 4<sup>th</sup> day of November, 2009.

Respectfully submitted,

  
VALERIE MARUSHIGE

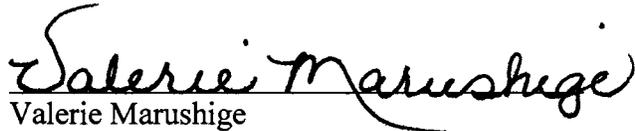
WSBA No. 25851  
Attorney for Appellant, Anthony Thomas Malm

**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 Thomas Roberts, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

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

DATED this 4<sup>th</sup> day of November, 2009 in Kent, Washington.

  
Valerie Marushige  
Attorney at Law  
WSBA No. 25851

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