COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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NO. 39136-8-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

OSCAR J. CHURCHILL,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY
The Honorable Carol Murphy, Judge
Cause No. 06-1-00838-7

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in revoking Churchill's SSOSA.

2. The trial court erred in failing to reduce the trial court's oral decision in this matter after the revocation hearing to written findings of facts and conclusions of law.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in revoking Churchill's SSOSA? [Assignment of Error No. 1].

2. Whether the trial court erred in failing to reduce the trial court's oral decision in this matter after the revocation hearing to written findings of facts and conclusions of law? [Assignment of Error No. 2].

C. STATEMENT OF THE CASE

Oscar J. Churchill (Churchill) was charged by information filed in Thurston County Superior Court with one count of child molestation in the first degree. [CP 3].

On July 13, 2007, Churchill entered a plea of guilty as charged and received a SSOSA sentence—he was sentenced to 68-months suspended based on his SSOSA sentence upon serving 6-months in jail. [CP 7-13, 14, 15, 16-26, 27-39; 7-13-07 RP 3-7; 9-20-07 RP 3-15].

During the course of Churchill's SSOSA sentence his CCO noted a number of violations that resulted in Churchill serving 30-days in jail for his violations. [CP 40-44, 45-46, 47-57, 58; 5-16-08 RP 3-18].

On October 9, 2008, the State filed a motion to revoke Churchill's SSOSA alleging two violations—contact with a minor on September 21st and 28th. [CP 72-78].

On March 16 and 17, 2009, the matter came before the court for hearing on the State's motion to revoke Churchill's SSOSA. [RP 5-238]. The court heard testimony from the following:

> Michael Boone (Churchill's CCO who conducted the original PSI and recommended that Churchill not be granted SSOSA) about Churchill's prior violations and that the current violations had been reported to him at which point he ordered a polygraph for Churchill with Marty Gunderson. [RP 21-52].
>
> M.Y. who testified that she had been exercising in the greenbelt in her neighborhood on September 21, 2008, when she noticed a man seeming to follow her around in a "stalking" manner (which phrasing she used for the first time during testimony after contact with the prosecutor and had never used before testifying even to the police). After this encounter, M.Y. was that a sexual offender lived in their neighborhood. She then testified that she again encountered a man on September 28, 2008, when she was sitting in the greenbelt after getting upset with her mother. The man rode up on his bicycle, said "hi," and rode off. M.Y. reported the encounter to her mother and the police were contacted. M.Y. never identified Churchill as the man involved in these encounters. [RP 53-70].
>
> Marty Gunderson who polygraphed Churchill regarding the September 21st and 28th incidents and found him to be deceptive. [RP 73-103]
>
> Patrick Seaberg a polygraph examiner who also polygraphed Churchill regarding the September 21st and 28th events, which he had reviewed by other polygraphers, all of whom found Churchill to be truthful—he did not violate his SSOSA conditions. [RP 104-119]

> Brian Cobb (Churchill's treatment provider) who that Churchill should continue with his treatment program under SSOSA rather than be revoked. [RP 119-180].
>
> Churchill who testified that he used the greenbelt in his neighborhood two to four times a week. He recalled on September 21st he had been walking his dog off leash and had gone around the greenbelt a number of times some of which he had gone chasing after his dog in the woods. He did not recall any encounter with M.Y.. With regard to September 28th, Churchill admitted that he could have been riding his bike that day but emphatically recalled no encounter where he said "hi" to any girl. [RP 181-202].

Based on this testimony the court found that no violation occurred on September 21st, but a violation occurred on September 28th, and based on this latter violation Churchill's SSOSA should be revoked. [RP 220-222]. The court then sentenced Churchill to his suspended sentenced of 68-months. [CP 79-89; RP 231-232]. The court entered no written findings of fact or conclusions of law following the revocation hearing.

Timely notice of appeal was filed on March 30, 2009. [CP 91]. This appeal follows.

D. ARGUMENT

(1) THE TRIAL COURT ERRED IN REVOKING CHURCHILL'S SSOSA.

An appellate court will review a SSOSA revocation for an abuse of discretion. State v. Badger, 64 Wn. App. 904, 908, 827 P.2d 318 (1992). A court abuses its discretion if its decision is manifestly unreasonable, or

based on untenable grounds or reasons. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A trial court may revoke a suspended sentence (including SSOSA) if an offender violates his or her sentence conditions. RCW 9.94A.670. Proof of a violation need not be established beyond a reasonable doubt but only must "reasonably satisfy" the court that the breach of a condition occurred. State v. Badger, 64 Wn. App. at 908. When reviewing a challenge to the sufficiency of the evidence for a SSOSA violation, an appellate court must consider the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the violation. State v. Luther, 157 Wn.2d 63, 77, 134 P.3d 205 (2006).

Here, Churchill was accused by the State of two violations of his SSOSA conditions both of which involved direct contact with a minor on September 21st and 28th. The sum of the State's evidence to prove these violations was the testimony at the revocation of M.Y. that she had been exercising on the greenbelt in her neighborhood on September 21st and that a man had passed her a number of times while she was doing so. Only after being interviewed by the prosecutor, did she testify that the man's actions were "stalking" in nature. M.Y. was then told by a friend and a friend's mother that a sexual offender was registered in their neighborhood and had been seen in the greenbelt when she had been

exercising. M.Y. then testified that on September 28th she had been again in the greenbelt upset with her mother when a man had ridden by on his bicycle. The man said "hi" and continued on not stopping. She reported the encounter to her mother and the police were contacted resulting in the violation report against Churchill. M.Y. never identified Churchill as the man she encountered on either day. In addition, the State's polygrapher, Marty Gunderson, polygraphed Churchill and found him to be deceptive regarding these events. Michael Boone, Churchill's CCO and the person who had conducted the PSI recommending that Churchill not be granted SSOSA, instituted violation proceedings against Churchill and testified that he should be revoked.

However, Churchill testified at the revocation hearing that he lived in the area and used the greenbelt in the neighborhood to exercise often with his dog from two to four times a week. On September 21st he recalled that he had been exercising his dog off leash and had gone around the greenbelt a number of times trying to keep control of his dog. He did not recall any specific encounter with M.Y. and denied that he had followed or "stalked" her in any way. With regard to September 28th, Churchill admitted that he could have gone to the greenbelt that day to exercise but he could not recall encountering anyone. He flatly denied saying "hi" to M.Y..

Moreover, Churchill was polygraphed by Patrick Seaberg regarding the incidents on September 21st and 28th and found Churchill to be truthful—he hadn't committed a violation of his SSOSA. Seaberg had three other polygraphers review his "charts" for accuracy all of whom concurred with his results. Brian Cobb, Churchill's treatment provider for SSOSA, also reviewed Churchill's polygraph and concurred with the result going so far as to testify that Churchill should continue with his treatment program.

Based on this evidence the court specifically found no violation on September 21st but a violation on September 28th when Churchill allegedly said "hi" to M.Y.. Such a finding is not tenable given the totality of the facts of this revocation hearing as it does not make any sense. Either M.Y. was credible and telling the truth on both occasions or she was exaggerating and making more of innocent encounters on the neighborhood greenbelt this is especially true where it must be considered that M.Y. had been informed after the first encounter that there was a sex offender living in her neighborhood and was coached to testify as to this encounter as "stalking" never having characterized the encounter as such before even to the police and then more that likely exaggerating a second encounter especially where she never identified Churchill as the man she encountered on either occasion. There was no evidence elicited by the

State that Churchill was the man M.Y. was referring to regarding her encounters on September 21st and 28th.

More importantly, Churchill denied any such encounters and a polygraph he took (reviewed by a number of people) support his contentions. While the State might argue that its polygraph examiner disagreed with Churchill's polygraph examiner the weight of the evidence favors Churchill in that the State's polygraph examiner did not have his charts reviewed as did Churchill's. Moreover, the only other person seeking the revocation of Churchill's SSOSA was his CCO, Michael Boone, the man who had sought to deny him SSOSA in the first place.

A review of the evidence in the light most favorable to the State indicates that the State has failed to establish that Churchill violated the conditions of his SSOSA. The trial court abused its discretion in revoking Churchill's SSOSA based on this record and this court should reverse and remand the matter for reinstatement of Churchill's SSOSA.

(2) CHURCHILLS'S REVOCATION FROM SSOSA SHOULD BE REVERSED AND HIS SSOSA REINSTATED FOR THE STATE'S FAILURE TO FILE WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING THE REVOCATION HEARING.

In the instant case, Churchill's SSOSA was revoked after a hearing and the trial court failed to entry the requisite written findings of fact and conclusions of law indicating exactly upon which evidence the court had

relied in making its decision. The trial court made an oral ruling, [RP 220-222, 231-232], but never reduced this opinion to proper written findings of fact and conclusion of law.

Under RAP 10.4(d), a party may include in the brief a "motion which, if granted, would preclude hearing the case on the merits." Therefore, Churchill moves this court for reversal of his SSOSA revocation and reinstatement of the same based on the State's failure to file written findings of fact and conclusions following the revocation hearing. This motion, if granted, would preclude hearing the case on the merits as the matter would be decided based on the State's failure to comply with applicable law.

As stated by our Supreme Court, an individual accused of violating conditions of SSOSA is entitled to minimal due process protections, such as the right to confront and cross-examine witnesses and written findings of the evidence relied upon. [Emphasis added]. State v. Abd-Rahmaan, 154 Wn.2d 280, 288, 111 P.3d 1157 (2005); State v. Dahl. 139 Wn.2d 678, 683, 990 P.2d 396 (1999).

On appeal, the court reviews solely whether the trial court's findings of fact are supported by substantial evidence and, if so, whether the findings support the trial court's conclusions of law. Mairs v. Department of Licensing, 70 Wn. App. 541, 545, 954 P.2d 665 (1993). Unchallenged findings of fact are verities on appeal and an appellate court "will review only those facts to which error has been assigned." State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). The failure to challenge

findings of fact is not a technical flaw contemplated in RAP 10.3(a)(3). *See* State v. Olson, 126 Wn.2d 315, 323, 893 P.2d 629 (1995). Moreover, error cannot be predicated on the oral decision of the trial court. State v. Reynolds, 80 Wn. App. 851, 860 n. 7, 912 P.2d 494 (1996). The State, as the prevailing party, has the primary obligation of presenting findings, which accurately reflect the trial court's oral ruling, but the trial court also shares some responsibility of ensuring that the record is complete. State v. Portomene, 79 Wn. App. 863, 865, 905 P.2d 1234 (1995).

Where there is an absence of findings or inadequate written findings, the appellant cannot properly assign error as required and the appellate court cannot conduct the appropriate review. Here, the trial court has failed to enter the required written findings of fact and conclusions of law following the revocation of Churchill's SSOSA. For the reasons stated in Abd-Rahmaan and Dahl, supra, without the proper written findings, which are long overdue (counsel requested the same in the designation of clerk's papers filed on 5-12-09 with the response as set forth on the clerk's papers index being that "Findings of Fact and Conclusions of Law have not been filed"), Churchill is prejudiced in that he is unable to assign error to the trial court's written findings and conclusions, and prepare the appropriate analysis of the issues presented by his trial with the result that he is without recourse to properly raise issues pertaining to the same.

Based on the above, Churchill respectfully requests this court reverse his revocation of SSOSA and reinstate the same because of the

State's failure to enter written findings and conclusions. *See* State v. Witherspoon, 60 Wn. App. 569, 571, 805 P.2d 248 (1991) (now Chief Justice Alexander in reversing and dismissing with prejudice stating, "[w]e cannot ignore the absence of findings and conclusions. We are not confronted here with a mere late entry of findings, but rather, complete noncompliance with the rule.").

E. CONCLUSION

Based on the above, Churchill respectfully requests this court to reverse the revocation of his SSOSA sentence and reinstate the same.

DATED this 30th day of September 2009.

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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 30th day of September 2009, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

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DEPUTY

Signed at Tacoma, Washington this 30th day of September 2009.

Patricia A. Pethick
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