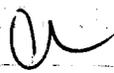


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STATE OF WASHINGTON  
BY 

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

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STATE OF WASHINGTON,

Respondent,

v.

WARREN HELZER,

Defendant/Appellant.

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APPELLANT'S REPLY BRIEF

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By:

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A.. REPLY ARGUMENT

1. *The State has failed to respond to Helzer's claimed error.*

The State's brief is devoted to misrepresenting the issue raised by Helzer. The State has an obligation to respond to relevant issues raised on appeal. The State's failure to do so supports Helzer's claim that the trial court erred.

First, no where in its brief does the State contest that the trial judge abused his discretion when he revoked the SSOSA because Helzer told Ms. Saylor that he wanted to change treatment providers. A request for a change is permitted under RCW 9.94A.670(5)(c). The State de facto concession on this issue is understandable given the plain language of the statute.

Instead, the State embarks on a red herring argument – that Helzer “waived” his objection to “sufficient notice” of the alleged violation. That is not Helzer's claim. Helzer's claim is that, while the state gave notice of a violation, it failed to prove that violation was a proper basis for revocation.

On August 12, 2010, the State filed a “Petition for Hearing to Determine Noncompliance with Condition or Requirement of Sentence.” CP 21-23. That petition alleged one violation: “Defendant has failed to

comply with sexual deviancy treatment resulting in termination from sexual deviancy treatment on or about 8/11/10 in Pierce County, Washington.” CP 21. The State based that violation upon a report by Ms. Saylor. The report began with the following paragraph:

This report is being written because Mr. Helzer requested to leave treatment with this provider and as a result has not finished in SSOSA treatment. He said he viewed the treatment program/methods as punitive and not meeting his needs to “complete my healing.” He informed me he had found another provider who provides treatment using love and spirituality. As a result of his request he was terminated from treatment following his treatment session on 8/11/10.

CP 25.

The judge made only the following finding: “your violation is not some little misstep. It’s the worse thing you can possibly do, get booted out of treatment.” RP 23. Helzer *did* object to the violation alleged. It is true that in his opening brief, Helzer anticipated that the State might assert on appeal that there some other violations. But those violations were never alleged and the judge’s oral finding does not support any other specific violation.

Moreover, the State is essentially arguing that, so long as some violation is alleged, proof of any uncharged violation is also a valid basis for revocation. The State seems to suggest that, since Helzer could have challenged any alleged violation once the hearing actually commenced, he

received “due process.” But the cases make it clear that simply having a hearing is not an adequate substitute for prior notice. Proper and specific notice enables the defendant to “marshal the facts in his defense and to clarify what the charges are, in fact.” *Wolff v. McDonnell*, 418 U.S. 539, 564, 94 S.Ct. 2963, 2978, 41 L.Ed.2d 935, 955 (1974). Failure to give the proper notice deprives the defendant of the opportunity to challenge or to mitigate the significance of the violation. See *Morrissey v. Brewer*, 408 U.S. 471, 488, 92 S.Ct. 2593, 2604, 33 L.Ed.2d 484, 499 (1972).

In this case, the general allegation was that Helzer “failed to complete treatment.” That “failure” was based upon Saylor’s unilateral termination of Helzer’s treatment. She said that:

Mr. Helzer has decided he does not want to be treated further by me. So, as a result, Mr. Helzer has been terminated from treatment and I am unwilling to provide him with further treatment.

C.P. 30. As a result Mr. Helzer and his counsel prepared to defend against that allegation and provided evidence of another provider who was ready, willing and able to treat him. 10/22/10 RP 18. He did not come to defend against violations now imagined by the State on appeal but never alleged in the trial court.

In essence the State would have this Court uphold the revocation on a basis never alleged in the report – lack of amenability to treatment.

But Ms. Saylor never alleged that Helzer was not amenable to treatment.

Instead she said:

I make no recommendation for another provider. It is up to him to make his position before the court that his changing providers is warranted.

CP 30.

*State v. Robinson*, 120 Wash.App. 294, 85 P.3d 376 (2004) is distinguishable because the defendant in that case *admitted* all of the violations even though some were not set forth in the pretrial notice. In this case Helzer denied the alleged violation.

Similarly *State v. Dahl*, 139 Wash. 2<sup>nd</sup> 678, 990 P. 2<sup>nd</sup> 396 (1999) is distinguishable. In that case the State alleged Dahl's failure to make reasonable progress in treatment as a basis for revocation. Dahl argued that the notice should have also included the allegations that he sent a note to bank teller and that he exposed himself to two young girls as independent violations. But the Court said:

The actions and statements of both the prosecutor and trial judge make clear that the two incidents were never intended to be considered as separate SSOSA violations. Instead, the incidents were taken into account for the purpose of assessing Dahl's overall treatment progress. The entire revocation process focused on Dahl's inability to accomplish the treatment goal of curbing his impulsive behavior.

Here the allegation was not that Helzer was failing to make adequate progress in treatment. Instead the allegation was that he had failed to

complete treatment because Ms. Saylor had terminated him after only a few treatment sessions.

2. *The State makes assertions that are not supported by citations to the record.*

In addition, the State's tone suggests that because Helzer is a sex offender, his legal issues are not entitled to serious consideration by this Court. In support of this approach, the State makes several unsupported allegations. This Court should ignore the following statements:

1. The State says that Helzer "attempted to retain a more flexible treatment provider in order to avoid treatment conditions aimed at his sexualized lifestyle." Brief of Respondent [BOR] at 7. There is no citation to the record and no support in the record for this statement. The proposed alternative provider was, like Ms. Saylor, state certified.

2. The defendant engaged in prohibited sexual relationship. BOR at 2. The evidence is that Mr. Helzer stated that he had slept in the same bed as Ms. Porter and Ms. Saylor "reminded him that while I was seeing him last summer and fall he had been told that I believed she was too many years older than him for them to be involved sexually." CP 27.

3. "The defendant's offender profile required that he be given only one chance to receive the discretionary benefit of a SOSSA sentence." BOR at 10. There is no evidence of any "offender profile" in

this case. And nothing in the SOSSA statute or the cases construing it support the notion that there are some defendants who are entitled to only “one chance.” Here Helzer confessed and sought treatment before he was arrested and charged with these offenses. He is a defendant who should be credited with recognizing that he needed treatment. And, it contradicts the State’s assertion that that Helzer was not committed completing a SOSSA treatment plan.

It is also worth noting that the State does not address the fact that Ms. Saylor did appear for the revocation hearing, never saw Helzer in jail because she could not find parking and terminated him after only two post-incarceration treatment sessions. These facts suggest that it was Ms. Saylor lacked any commitment to providing Mr. Helzer with effective treatment and supports the conclusion that Helzer had good reason for seeking a new treatment provider.

## B. CONCLUSION

It is true that Helzer committed serious criminal offenses. However, it is not true that he “failed to complete treatment.” This Court must reverse the order revoking the suspended sentence and remand for a new hearing.

Respectfully submitted this 11<sup>th</sup> day of July, 2011.

  
Suzanne Lee Elliott, WSBA 12634  
Attorney for Warren Helzer

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

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I declare under penalty of perjury that on July 11, 2011, I placed a copy of this document in the U.S. Mail, postage prepaid, to:

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