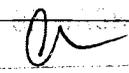


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STATE OF WASHINGTON
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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

WARREN HELZER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas J. Felnagle

No. 09-1-00111-3

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should the Court reject defendant's claim that he did not receive sufficient notice of his violation when he failed to preserve the issue below and received the limited due process required for a revocation hearing?
2. Did the sentencing court abuse its discretion when it revoked defendant's SSOSA sentence because he was terminated from sexual deviancy treatment?

B. STATEMENT OF THE CASE.

On August 12, 2010, the Pierce County Pierce County Prosecutor's Office filed a petition for hearing to determine whether appellant WARREN MATTHEW HELZER ("defendant") was out of compliance with a condition of his suspended sentence. CP 20-23. The petition alleged defendant "failed to comply with sexual deviancy treatment resulting in termination ... on or about 8/11/10" CP 20-23. Defendant's designated treatment provider filed a letter in support of the treatment-related violation on September 1, 2010. CP 24-30.

The conditions of defendant's suspended sentence began on February 5, 2010, when he was sentenced to 130 months in custody with 124 months suspended pursuant to the Special Sex Offender Sentencing Alternative ("SSOSA"). CP 5-19. The court granted defendant's SSOSA following his plea of guilty to three counts of child molestation in the first

degree for the repeated sexual abuse of his daughter and two sons over the course of several years when the children were between the ages of four and six. CP 3-4, 12, 67-78, 83.¹ Among the other conditions of his SSOSA sentence, defendant was ordered to successfully complete an outpatient sex offender treatment program with his designated treatment provider Maureen Saylor. CP 12. Defendant was also ordered to follow the treatment-related conditions established by Ms. Saylor as well as the rules of community custody set by his community corrections officer (“CCO”). CP 12-13.

A modification hearing was held on October 22, 2010, to address defendant’s termination from SSOSA treatment. RP 3. The information before the court showed defendant violated his treatment provider’s rules and repeatedly challenged her authority to impose treatment-related limitations on his behavior. CP 26-29; RP 7-9. During the time between his release from custody on June 14, 2010, and his termination from treatment on August 11, 2010, defendant engaged in a prohibited sexual relationship, initiated third-party contact with his wife and victim-children, and resisted a clothing restriction aimed at curtailing his ability to expose himself in public. CP 26-29; RP 7-9. When defendant’s treatment provider (Ms. Saylor) attempted to hold him accountable to his treatment conditions, defendant became upset, said “it wasn’t fair,” and told her that

¹ The Clerk’s Papers filed on the 29th day of November, 2010, end at CP 66. Hereafter, CP 67-92 are only estimates until the documents are numbered by the Clerk of Court.

he did not want to remain in therapy with her because the process was punitive. CP 28. Defendant also disclosed that he was considering an alternative treatment provider recommended by the woman Ms Saylor had prohibited him from being romantically involved with. CP 27-28. Ms. Saylor reminded defendant that he was not to change treatment providers without a court order. CP 28. At defendant's next treatment meeting, he implied he had a right to change treatment providers, expressed his intent to do so, and asked about the consequences. CP 29. Ms. Saylor told defendant she could not continue to treat him because he challenged her rules and failed to identify her as his treatment provider. CP 29. Defendant became angry and told Ms. Saylor she was "trying to screw him." CP 29. Defendant then "rant[ed]" about the inequality of her rules, claimed she was violating his civil rights, and said he was going to hire a lawyer to sue her. CP 29. Ms. Saylor notified defendant that she was terminating him from treatment. CP 29.

Following the presentation of evidence at defendant's modification hearing, the sentencing court recalled its concern that defendant would obstinately attempt to dictate the conditions of his treatment. RP 21-22.² The sentencing court then recalled that it had warned defendant that

² Defendant did not request transcripts of his sentencing hearing so the State's response must rely on the sentencing court's expressed recollection of what was communicated to defendant at the sentencing hearing.

“given [his] profile and [the court’s] concerns ... [he was] going to be a one-time, one-shot, one-chance, only SSOSA recipient.” RP 22. The court also recalled that defendant stated that he understood he would only have one chance. RP 22. Finding that defendant engaged in exactly the kind of oppositional behavior that concerned it at the outset of defendant’s SSOSA, the sentencing court revoked defendant’s suspended sentence because of his termination from treatment. CP 62-64, RP 23-24.

Defendant filed a timely notice of appeal from the entry of the order revoking suspension of sentence. CP 93.

C. ARGUMENT.

1. THE COURT SHOULD REJECT DEFENDANT’S CLAIM THAT HE DID NOT RECEIVE SUFFICIENT NOTICE OF HIS VIOLATION WHEN HE FAILED TO PRESERVE THE ISSUE BELOW AND RECEIVED THE LIMITED DUE PROCESS REQUIRED FOR A REVOCATION HEARING.

“The revocation of a suspended sentence is not a criminal proceeding.” *State v. Dahl*, 139 Wn.2d 678, 683, 990 P.2d 396 (1999), citing *State ex rel. Woodhouse v. Dore*, 69 Wn.2d 64, 416 P.2d 670 (1966).

Accordingly, “[a]n offender facing revocation of a suspended sentence has only minimal due process rights.” *Id.* at 683 citing *State v. Nelson*, 103 Wn.2d 224, 230, 691 P.2d 964 (1984). “Sexual offenders

who face SSOSA revocation are entitled the same minimal due process rights as those afforded during revocation of probation or parole.” *Id.* at 683, citing *State v. Badger*, 64 Wn. App. 904, 907, 827 P.2d 318 (1992).

“The United States Supreme Court has determined that, in the context of parole violations, minimum due process entails: (a) written notice of the claimed violations; (b) disclosure to the parolee of the evidence against him; (c) the opportunity to be heard; (d) the right to confront and cross-examine witnesses (unless there is good cause for not allowing confrontation); (e) a neutral and detached hearing body; and (f) a statement by the court as to the evidence relied upon and the reasons for the revocation.” *Id.* at 683, citing *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972).

Alleged due process violations are reviewed de novo. *In re Pers. Restraint of Heidari*, 159 Wn. App. 601, 605, 248 P.3d 550 (2011). However, “a defendant c[an] not sit by while his due process rights [a]re violated at a hearing and then allege due process violations on appeal.” *State v. Robinson*, 120 Wn. App. 294, 299, 85 P.3d 376 (2004) citing *State v. Nelson*, 103 Wn.2d 760, 697 P.2d 579 (1985). “[N]otice should be treated in the same manner, as notice is also an element of due process under *Morrissey*.” *Id.* at 299 (Robinson argued that his due process rights under *Morrissey* were violated because he did not receive proper notice

of the alleged violation. In its report, the DOC listed eight violations, and the trial court used this list during the hearing. When the State listed these eight allegations at the modification hearing, Robinson did not object, but admitted allegations 3 through 8. Finding that Robinson did not object to notice at the time of the modification hearing, the Court of Appeals held that he waived the notice requirements and it would not address the issue on appeal.); *see also Dahl*, 139 Wn.2d at 683-684, 668, 689 (Dahl argued that the notice provided to him by the State was inadequate because it only cited Dahl's failure to make reasonable progress in treatment as the ground for revocation. Dahl asserted that the notice should have also listed several individual incidents considered by the trial court when determining whether he had made sufficient progress with treatment. Finding that the specific incidents relied upon by the court were not presented as violations, but as evidence of Dahl's lack of progress with his treatment, the Supreme Court held that Dahl had been adequately informed of the nature of his violation and the facts supporting it).

Returning to the case at bar, defendant failed to object to notice at his modification hearing, so he cannot raise insufficient notice for the first time on appeal.

Moreover, defendant received the minimal due process required by *Morrissey*. Defendant was made aware of the evidence supporting his

treatment-related violation after receiving a written petition for review which expressly called for the revocation of his suspended sentence for his termination from treatment. He had an opportunity to be heard as well as confront the State's witness at his modification hearing, and the revocation was decided by a Superior Court Judge who informed him that his SSOSA was being revoked for the violation identified in the State's petition for review. CP 20-30; RP 6, 12-21.

Nevertheless, defendant's untimely challenge to notice states that the sentencing court violated his due process right to notice if it failed to limit its decision to whether defendant's expressed desire to find another treatment provider warranted revocation. Not only did defendant fail to make this objection at the modification hearing, his argument depends on a mischaracterization of the alleged violation. The issue before the Court was defendant's termination from sexual deviancy treatment, not his expressed desire to replace Ms. Saylor as his treatment provider.

Although it did not serve to limit the sentencing court's decision as defendant suggests, the fact that defendant attempted to retain a more flexible treatment provider in order to avoid treatment conditions aimed at curtailing his sexualized lifestyle was certainly worthy of the court's attention and could have legitimately factored in its decision. Similar to *Dahl*, once defendant was notified that the State was moving to revoke his suspended sentence due to his termination from SSOSA treatment, he

could not have reasonably expected the sentencing court to decide the issue without evaluating the evidence properly offered in support of the State's request.

The sentencing court based defendant's SSOSA revocation on the violation timely noted in the State's petition for review and the hearing complied with his right to minimal due process. The sentencing court's order revoking suspension of sentence should be affirmed.

2. THE SENTENCING COURT DID NOT ABUSE ITS DISCRETION WHEN IT REVOKED DEFENDANT'S SSOSA SENTENCE BECAUSE HE WAS TERMINATED FROM SEXUAL DEVIANCY TREATMENT.

"[T]he government has an important interest in protecting society, particularly minors, from a person convicted of [molesting] ...child[ren]. That interest is rationally served by imposing stringent conditions related to [that] crime." *State v. McCormick*, 166 Wn.2d 689, 702, 213 P.3d 32 (2009). "[A defendant's] rights are already diminished significantly [when] he [i]s convicted of a sex crime and, only by the grace of the trial court, allowed to live in the community subject to stringent conditions. Those conditions... sever an important societal purpose in that they are limitations on [a defendant's] rights that relate to the crimes he committed." *Id.* at 702-703.

“Under the Sentencing Reform Act ... the trial court may revoke a SSOSA sentence whenever the defendant violates the conditions of the suspended sentence or the court finds the defendant is failing to make satisfactory progress in treatment.” *Id.* at 698, *see also* RCW 9.94A.670. “Once a SSOSA is revoked, the original sentence is reinstated. *State v. Miller*, 159 Wn. App. 911, 918, 247 P.3d 457 (2011) citing *State v. Dahl*, 139 Wn.2d 678, 683, 990 P.2d 396 (1999).

“A trial court’s decision to revoke a SSOSA suspended sentence is reviewed for an abuse of discretion.” *State v. Miller*, 159 Wn.App. at 918. “A trial court abuses discretion only where the trial court’s decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Id.* at 918, citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (The sentencing court revoked Miller’s suspended sentence after he violated several conditions of his treatment, to include engaging in an impermissible relationship with a member of the opposite sex. The court identified the question before it as whether “we want to take a chance on somebody who shows [he] do[es]n’t have a lot of interest in following the rules, [who] is more interested in trying to change the rules of the game [than] following them?” Answering that question in the negative, the court “recall[ed] ... telling [Miller] in no uncertain terms that he was in grave danger of being revoked, and that if there were any further violations, he would be revoked.” “[Miller] stated

that he understood.” Finding that the sentencing court articulated legitimate reasons to revoke Miller’s SSOSA sentence, the Court of Appeals held that the sentencing court did not abuse its discretion.).

The authority vested in the trial court by RCW 9.94A.670 was not intended to deprive it of the discretion to narrowly tailor its tolerance for treatment failures according to the societal risks posed by the offender before it. In the instant case, defendant was recognized as a borderline SSOSA candidate from the outset of his suspended sentence. His evaluator, treatment provider, and the court all expressed reservations about defendant’s willingness to follow treatment conditions and projected his oppositional behavior would prove a significant barrier to his success. CP 24-30; RP 21-22. Defendant recognized nothing less of himself when he stated that his “free spirit[ed]” nature made the restrictions associated with SSOSA of particular concern. CP 90. Nevertheless, the defendant told the court that he would comply with the program, and the court—by its grace—gave the defendant the chance he requested. RP 21-22. When it did so, the sentencing court made it clear to the defendant that his profile demanded he be treated as a “one-time, one-shot, one-chance, only SSOSA recipient.” RP 22.

The sentencing court was not unreasonable in finding that defendant’s offender profile required that he be given only one chance to receive the discretionary benefit of a SSOSA sentence. The court file reveals that defendant is a “self-reported sex addict [who] crosses all

barriers to include exhibitionism, voyeurism, bondage, cross-dressing, uriphilia, coprahilia, and zoophilia. CP 92. The court file also reveals that defendant did not take responsibility for his crimes; instead, he described his charges as “ridiculous,” claimed he was being persecuted by the courts, and stated that the decision to keep him away from his children was a fear induced response stemming society’s sexual repression. CP 87-88. Defendant also threatened to kill his wife for treating him unfairly when she reported his sexual abuse of their children to authorities. CP 26, 87.

Notwithstanding how fortunate defendant was to receive a SSOSA from the sentencing court in the first place, defendant lived out the court’s initial concerns by engaging his treatment provider (Ms. Saylor) in an “ongoing battle” over treatment conditions that did not suit his preferences. RP 7-11. Nearly immediately after being released from jail—at a time when one would expect defendant to be on his best behavior—defendant unlawfully possessed a firearm, engaged in a prohibited sexual relationship, called his sister-in-law to inquire about his wife and victim children, and challenged clothing restrictions aimed at curtailing his exhibitionist pattern of public indecency. CP 14, 24-29. Rather than accepting his treatment failures apologetically, with a renewed commitment to follow through with his conditions, defendant sought to replace Ms. Saylor with a treatment provider recommended by the very woman Ms. Saylor had prohibited him from being romantically involved

with. Defendant also lectured Ms. Saylor on the punitive nature of his conditions, challenged her authority, and threatened to sue her.

Combined with defendant's obstinate response to his treatment conditions was his continued characterization of himself as the victim. Here, defendant discounted his own treatment failures by claiming Ms. Saylor treated him unfairly, just as he discounted his crimes against his children by claiming his wife treated him unfairly by reporting him to authorities.

The record also makes it clear that the sentencing court did not simply rubber stamp Ms. Saylor's conclusions. Instead, the court paid careful attention to the possibility of a personality mismatch between defendant and Ms. Saylor. RP 7-11. To this end, the court explicitly asked defendant's community corrections officer (CCO Cheney) whether the defendant's issues could be rectified by finding him a more compatible treatment provider. RP 7-11. CCO Cheney assured the court that the issue before it was defendant's unwillingness to follow his treatment provider's directives, and his attempt to secure another treatment provider to avoid treatment conditions that displeased him. RP 7-11.

The sentencing court found further support for the reasonableness of Ms. Saylor's decision to terminate defendant's treatment in the letter written by the very treatment provider defendant sought to replace her. RP

22-23; CP 24-30. Among other points of agreement, the other provider stated Ms. Saylor outlined ample reasons to terminate defendant's treatment. RP 22-23.

Defendant now argues that the sentencing court abused its discretion in revoking his suspended sentence by mischaracterizing the court's decision as one resulting from defendant's mere inquiry into the possibility of changing treatment providers. Defendant's characterization of the court's basis for revocation is simply not supported by the record. At defendant's violation hearing, the court told defendant: "You and I had, in effect, a contract ... You knew what the result was going to be if you got into trouble... You did exactly what was projected to be the problem with this. You lived it out. And I'm sorry, but we made it abundantly clear what was going to happen, and your violation is not some little misstep. It's the worst thing you can possibly do, get booted out of treatment." RP 23. Since a SSOSA sentence may be revoked at any time if the offender has failed to make satisfactory progress in treatment, and termination from treatment makes progress impossible, the court's decision to revoke defendant's suspended sentence was based on a tenable ground and ordered for a tenable reason; it was not manifestly unreasonable and should be affirmed.

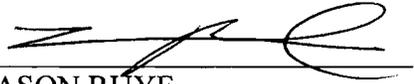
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D. CONCLUSION.

Defendant failed to preserve the issue of notice for appeal and has otherwise failed to prove that his SSOSA revocation failed to comply with his right to minimal due process. Defendant has also failed to prove that the sentencing court abused its discretion by treating his termination from sexual deviancy treatment as a violation warranting revocation. The revocation of defendant's suspended sentence should be affirmed.

DATED: June 9, 2011.

MARK LINDQUIST
Pierce County
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WSB # 38725

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6/9/11 _____
Date Signature