

No. 42918-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

City of Lakewood, Petitioner,

v.

Roberts, Aaron W., Respondent.

BRIEF OF RESPONDENT

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A. STATEMENT OF THE ISSUES

The City of Lakewood asserts the Lakewood Municipal Court erred in denying the City prosecutor's motion to revoke a Stipulated Order of Continuance (SOC) because the court did not afford the prosecutor's decision the "requisite deference." Upon a motion to revoke, the trial court must first determine whether facts exist to support a prosecutor's termination decision, and then assess the reasonableness of the prosecutor's decision in light of those facts. Here, the trial court found an "arguable violation," but denied the prosecutor's motion. In its ruling, the trial court impliedly concluded the City's motion was unreasonable under the circumstances of this case. Should this court reverse the trial court's decision?

B. STATEMENT OF THE CASE

The Respondent, Aaron W. Roberts, was charged with two counts of malicious mischief (one of which was domestic violence designated) by the City of Lakewood. With the advice and assistance of counsel, on June 10, 2008, he entered into a pretrial diversion agreement. The agreement, entitled a Stipulated Order of Continuance (SOC), continued the matter for a period of 24 months. If Mr. Roberts complied with the conditions of the agreement, at the end of the 24 months, the City would move to dismiss

both charges of malicious mischief. Under the terms of the SOC, Mr. Roberts agreed to: 1) have no violations or [sic] criminal law during the period of the continuance; 2) appear at all hearings and immediately notify the court of any address changes; 3) pay a monitoring fee of \$500; 4) attend an Anger Management course; and 5) have no contact with Megan M. Parr and Jerald C. Topasna. Additionally, Mr. Roberts waived his right to a jury trial and stipulated to “facts sufficient,” agreeing the factual issues would be resolved solely by the police report. CP 24.

The City filed a written motion to revoke the SOC, and a hearing on the motion was held September 30, 2010. 11/9/2010 Muni.Ct.CP 2-14.¹ After considering argument from the City and the defendant, the Pro Tem Judge denied the City’s motion to revoke and dismissed both counts of malicious mischief over the City’s objection. Muni.Ct.VRP 6-7. The trial court held:

I’m going to deny the motion to revoke um this Stipulated Order of Continuance in, in, counsel and the defendant should be aware that that’s an unusual act for this court because its Stipulated Orders of Continuance are routinely revoked whenever there is an arguable violation. I’m not going to do that. And the reason I’m not going to do that is because counsel represented that she has close enough contact with Mr. Roberts and that he’s been a good enough client

¹¹ Respondent will adopt the Petitioner’s method of citing to the portions of the record listed as attachments to the Clerk Papers and sent under separate cover by the Superior Court. Please see Footnote 1 of Petitioner’s Brief.

that he's reporting to her on a regular basis and I'm, I'm going to give, I'm going to continue to give him the benefit, the benefit of the Stipulated Order of Continuance.

Muni.Ct.VRP 6.

The City appealed the decision to the Pierce County Superior Court. Argument was heard on December 8, 2011, and the Superior Court affirmed the lower court's ruling. The Superior Court reasoned: "whether or not the trial court granted or denied the City's motion to revoke the pretrial agreement was a decision within its discretion, and this court cannot find [an abuse of discretion.]" CP 42.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY DENIED THE PROSECUTOR'S MOTION TO TERMINATE THE PRE-TRIAL AGREEMENT IN LIGHT OF THE FACTS SURROUNDING THE "ARGUABLE" VIOLATIONS.

In *State v. Marino*, the Supreme Court established the due process requirements of a hearing on termination of a pretrial diversion agreement (specifically, a deferred prosecution.) 100 Wn.2d 719, 674 P.2d 171 (1984). In its assessment of those requirements, the court determined the role of the trial court is to resolve any factual disputes and decide whether there has been a violation of the agreement. Once the trial court resolves the factual dispute, it must review the reasonableness of the prosecutor's

decision to terminate. *Id.* at 725. Hence, under the ruling of *Marino*, it is the *trial court's* review of a prosecutor's decision that "should consist of assessing its reasonableness in light of the facts the trial court determines at hearing." *Id.* at 725. The *Marino* court did not define the standard or scope of appellate review of the trial court's decision. *State v. Kessler*, 75 Wn. App. 634, 639-39, 879 P.2d 333 (1994).

State v. Kessler is the only case in which the standard of appellate review of a decision to terminate a pretrial diversion agreement is addressed. There, Division I was called upon to review the termination of a pre-prosecution agreement between Mr. Kessler and Snohomish County after Mr. Kessler appealed the trial court's finding that the decision by the prosecutor to terminate was "not unreasonable." *Id.* at 639. The *Kessler* court held a trial court's findings of fact are to be reviewed under a "sufficiency of the evidence" standard. *Id.* at 639 (citations omitted). Under that standard, the reviewing court must ascertain that "facts exist that support a prosecutor's termination decision." *Id.*, quoting *Marino*, 100 Wn.2d 719 at 726. If such facts exist, then the appellate court should step into the role of the trial court and assess the reasonableness of the prosecutor's decision in light of those facts. *Id.*

a. The Trial Court's Finding of "Arguable Violations"

Originally, the City alleged three violations of the SOC: 1) an April 24, 2010 driving while license suspended in the third degree charge which resolved by way of a bail forfeiture; 2) a March 26, 2009 driving while license suspended in the third degree charge reduced to an infraction; and 3) financial non-compliance. Muni.Ct.VRP 2. At the time of the revocation hearing, the financial requirements of the SOC had been met, and Mr. Roberts argued to the trial court that he had the inability to pay more timely due to hardship. Muni.Ct.VRP 3-4. Indeed, on appeal, the City did not argue revocation of the SOC would have been proper based upon the financial noncompliance. The focus of the prosecutor's argument in support of revocation of the pretrial diversion was the assertion Mr. Roberts twice violated the criminal laws by driving on a suspended license.

When a violation is alleged, the burden is on the prosecution to establish that violation by a preponderance of the evidence. *Marino*, 100 Wn.2d 719 at 725. Here, the city prosecutor filed a written motion to revoke the SOC and attached police reports in support of the motion. The trial court's ruling was at best ambiguous as to whether or not the police reports submitted in support of the motion to revoke established a

violation of the conditions. The court made no factual findings, but stated it was “an unusual act for this Court” to deny a motion to revoke “whenever there is an arguable violation.” Muni.Ct.VRP 6.

In *Marino*, the trial court also failed to make factual findings or a statement of the evidentiary grounds upon which it relied. Rather than remand for a statement of findings, the Supreme Court conducted its own review of the record and found the trial court had ample basis to find violation of the agreement by a preponderance of the evidence. *Marino*, 100 Wn.2d at 726-27. The *Marino* court opined: “[t]he trial court clearly did find the prosecutor’s decision to terminate reasonable in light of the facts ascertainable from the evidence. This finding satisfies the standard of review we hold appropriate for pretrial diversion terminations.” *Id.* at 727.

In light of the *Marino* ruling, Mr. Roberts conceded for purposes of appeal that the police reports submitted by the city prosecutor would have established by a preponderance of the evidence that the defendant drove while his license was suspended in the third degree. It is also presumed that the trial court reviewed the City’s written motion. Yet, being aware of those facts, the trial court denied the City’s motion to terminate the pretrial diversion agreement. Though not clearly stated on

the record, the implication of the trial court's oral ruling is that it found the City's decision to terminate unreasonable in light of the other facts presented at the revocation hearing.

The police reports submitted on the driving charges were not the only evidence presented at the revocation hearing. Defense counsel presented and argued a number of circumstances relevant to the materiality of those driving charges. An important fact was that the pretrial diversion was entered on two counts of malicious mischief - one of which was designated as a crime of domestic violence. Yet, the prosecutor's motion to terminate the agreement was based upon two instances, more than a year apart, of the defendant driving while his license was suspended in the third degree. As defense counsel pointed out to the trial court, Mr. Roberts did not incur any similar law violations during the period of the continuance; there were no allegations of violence or contact with the victims; and he completed anger management. Mr. Roberts's license was suspended as a result of his failure to pay traffic fines. CP 33-35. Defense counsel explained in her argument to the trial court that Mr. Roberts had been experiencing financial hardship. Where the underlying problem is hardship and inability to pay financial obligations, courts have not upheld a prosecutor's decision to terminate a

pre-trial agreement. *Kessler*, 75 Wn. App. 634, 640, citing *United States v. Snead*, 822 F.Supp. 885, 888 (D.Conn.1993). Finally, each of the driving charges resolved with civil remedies: the March 2009 offense was amended to an infraction and bail forfeiture was entered on the April 2010 offense.

Although the City provided police reports from which a court could find by a preponderance of the evidence that a criminal law violation did indeed occur during the SOC, the trial court clearly gave consideration to the mitigating circumstances presented on behalf of Mr. Roberts. Despite finding violations, the trial court termed them as “arguable” due to the number of mitigating circumstances presented by Mr. Roberts’s attorney at the revocation hearing. Being “persuaded by counsel’s argument,” the judge denied the City’s motion to revoke.

b. The Prosecutor’s Decision to Terminate was Unreasonable

The *Kessler* court concluded the “determination as to whether termination is reasonable” for violations is “analogous to the determination in a breach of contract case of whether a breach is material thus warranting a remedy.” *Id.* at 640-41. The materiality depends on the circumstances of each particular case. *Id.* at 641, citing *Vacova Co. v. Farrell*, 62 Wn. App. 386, 403, 814 P.2d 255 (1991). Examining the

circumstances of this particular case, it can be reasonably concluded that two instances of driving on a suspended license, particularly where the allegations did not result in criminal convictions, do not amount to a material breach of the pretrial diversion agreement. In light of the nature of the breach of the agreement and the compliance with the other conditions, the prosecutor's decision to terminate was found to be unreasonable, and the motion to revoke was denied. The decision of the trial court should not be disturbed.

In its brief, the City repeatedly refers to the "deference" to be given prosecutors in a criminal pretrial diversion agreement. But deference does not translate to unfettered discretion or an absolute power to terminate. Due process requires a fact finding hearing, and, if facts are found, the court still has the authority to assess the reasonableness of the prosecutor's decision to terminate. Petitioner's reference to the Kitsap County Plea Negotiations Manual and the "zero tolerance" policy adopted by that county's prosecutors only underscores the need for a neutral fact finder and neutral party to assess the reasonableness of any motion to revoke. *Kessler* directs courts to analogize to contract principles when assessing that reasonableness. *Id.* at 639. In so doing, a court must consider the particular circumstances of the case before it. To grant a

motion to revoke based upon a finding by the preponderance that a law violation has occurred without regard to the nature of the law violation, to the circumstances surrounding its commission, or to its relation to the crime for which the defendant is on pretrial diversion is to disregard the particular circumstances of the case.

The trial court in this case followed the analysis set forth by the *Kessler* court and assessed the particular circumstances of the case before it. In so doing, it considered the factors set forth above and concluded the violations were not material. Admittedly, the trial court's ruling could have been more artfully and clearly stated for the record. The trial court did not use the key word "unreasonable." However, the implication of the trial court's ruling is clear: the violations, though established, were "arguable" in their materiality. Hence, the prosecutor's decision to terminate was unreasonable under the circumstances.

D. CONCLUSION

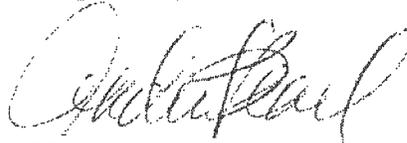
The trial court's denial of the City's motion to revoke should be upheld. *State v. Kessler* is the only precedent on the standard of review an appellate court is to apply when evaluating a trial court's decision to grant or deny the prosecutor's termination of a pretrial diversion agreement. 75 Wn.App. at 639. The Superior Court's conclusion that the trial court did

not abuse its discretion in denying the prosecutor's motion to terminate the agreement is not inconsistent with that precedent. Stepping into the role of the trial court, applying contract principles, and "assessing [the] reasonableness of the prosecutor's decision "in light of the facts," this court should likewise conclude the violations were not material given the particular circumstances of this case. As such, the prosecutor's decision to terminate was properly deemed unreasonable.

For these reasons and those set forth in Part C above, this court should affirm the trial court's decision.

DATED: 5.7.12

Respectfully Submitted,



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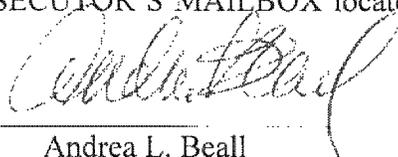
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