

FILED

JUN 07 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

NO. 28610-0-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

BRIAN KOHN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRANT COUNTY

The Honorable John M. Antosz, Judge

BRIEF OF APPELLANT

DANA M. LIND
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
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A. INTRODUCTION

Appellant Brian Kohn is appealing from the revocation of his suspended sentence entered under the special sex offender sentencing alternative (SSOSA), following his pleas to two counts of child molestation. In support of revocation, the state alleged Kohn violated the conditions of community custody on three occasions by: using methamphetamine on February 25, 2009; failing to report for urinalysis on July 27-28, 2009; and using methamphetamine on July 29, 2009. In its violation report to the court, the state did not allege Kohn was not making satisfactory progress in sex offender treatment.

In fact, at the time of the revocation, Kohn was doing well in sex offender treatment. Kohn's treatment provider, Michael Morris, testified that despite the recent violations, he considered it "a reasonable option" to allow Kohn to remain in community treatment. Morris gauged Kohn's prognosis for success in treatment as good.

Halfway through the revocation hearing, in response to questions from the court, the state indicated it was also alleging Kohn had failed to make satisfactory progress in sex offender treatment.

The court found the alleged violations proven. The court noted it could revoke Kohn's SSOSA on that basis alone. However, it did not. The court resolved, however, to "look at whether or not there's been satisfactory progress." Because Kohn was just over halfway through the program in the amount of time originally estimated as needed to complete it, the court found Kohn was not making satisfactory progress and revoked his SSOSA.

Because Kohn was not given written notice of the allegation he was failing to make satisfactory progress in treatment, he argues the court's revocation violated his due process rights.

Kohn also argues that his sentence on one of the counts under the non-persistent offender statute, former RCW 9.94A.712, is illegal, because the non-persistent offender statute was not in effect at the time of that offense.

B. ASSIGNMENTS OF ERROR

1. The court's revocation of Kohn's SSOSA violated his due process rights, as it was based on an uncharged allegation.

2. Kohn's indeterminate sentence for the count alleged to have occurred between 1997 and 1998 is illegal, as it was imposed pursuant to a statute that did not exist at that time.¹

Issues Pertaining to Assignments of Error

1. Where the state alleged violations of community custody relating to drug abuse, did the trial court violate Kohn's due process rights by revoking his SSOSA based on its finding he was failing to make satisfactory progress in sex offender treatment?

2. Former RCW 9.94A.712 was not enacted until 2001. Yet, Kohn was sentenced and given an indeterminate sentence pursuant to this statute for an offense allegedly occurring between 1997 and 1998. Should this Court find appellant's sentence unlawful and reverse and remand for a new sentencing hearing, at which Kohn should be sentenced in accord with the law in effect at the time of the offense?

¹ As charged, this was count 2. However, it is count 1 on the Judgment and Sentence. CP 1-2, 13-14, 55.

C. STATEMENT OF THE CASE²

1. The SSOSA

On October 8, 2004, Brian Kohn was charged with two counts of first degree rape of a child, allegedly committed against his daughter and step-daughter. CP 1-2; CP 3-11. Count 1 allegedly occurred between 2002 and 2003, while count 2 allegedly occurred between 1997 and 1998. CP 1-2. Kohn pled guilty to amended charges of first degree child molestation, occurring on the dates previously noted. CP 13-14, 45-54. Pursuant to the plea, the state agreed it would recommend a SSOSA if an evaluator found Kohn amenable. CP 49.

In anticipation of sentencing, the department of corrections (DOC or the department) filed a report recommending against a SSOSA. CP 16-30. The recommendation was based in part on CCO Stephanie Canterbury's visit to Kohn's home. Canterbury claimed that when she arrived, Kohn immediately shut down his computer. CP 26. Also, there was a neighbor who appeared (to Canterbury) to be passed out, and a couple sleeping in one of the bedrooms. CP 26-27.

² For brevity, the facts pertaining to the non-persistent offender sentencing issue will be set forth solely in the accompanying argument section. The facts set forth here relate to the SSOSA revocation.

Kohn explained his neighbor stayed over after the two stayed up all night playing games. The man in the bedroom (Kohn's former brother-in-law) stayed over, due to car troubles; Kohn did not know his girlfriend was also there. CP 26-27. Canterbury was also concerned by Kohn's new relationship with Bambi Wright, who had a 4-year-old daughter who had been removed from Wright's care by Child Protective Services (CPS). CP 25. According to Canterbury, sex offender treatment provider John Colson, who evaluated Kohn, found him not amenable to treatment. CP 29.

This was untrue, however, as Colson submitted a favorable report and recommended a SSOSA at the sentencing hearing. CP 31-44; RP (4/11/06) 14. Colson explained the confusion stemmed from a phone conversation he had with Canterbury following her visit to Kohn's home. Based on what she said, Colson was concerned Kohn might be partying or accessing pornography. RP (4/11/06) 24. If so, Colson would not consider Kohn a good SSOSA candidate. RP (4/11/06) 25.

Colson directed Canterbury to order a urinalysis test for Kohn and enlist a trained officer to search Kohn's computer. An officer subsequently searched the computer and found no evidence

of pornography or wrongdoing. Also, the urinalysis showed no alcohol or drug use. Colson discussed the home visit with Kohn, and his explanation was reasonable and consistent with what Canterbury reported. RP (4/11/06) 25.

Regarding Bambi Wright, Colson explained to the court that she had told him during an interview she did not intend to regain custody of her child. RP (4/11/06) 28. If she were to decide otherwise, however, Colson agreed "that would change the picture in terms of Mr. Kohn being in that relationship." RP (4/11/06) 29.

Colson found Kohn to be a good SSOSA candidate. RP (4/11/06) 27. Testing showed emotional and substance abuse issues, as opposed to an antisocial or criminal nature. RP (4/11/06) 27-28. Colson also noted that sex offender treatment is most successful for incest offenders, as opposed to predatory offenders. RP (4/11/06) 27.

The prosecutor likewise recommended a SSOSA. RP (4/11/06) 5. Although the parties initially believed the family also would recommend a SSOSA, they did not. RP 6-9. However, the defense agreed the confusion and family's ultimate recommendation did not constitute a breach of the plea agreement. RP (4/11/06) 11.

The court agreed with the SSOSA recommendation and imposed indeterminate sentences of 96 months to life under RCW 9.94A.712, suspended on condition that Kohn: serve six months in jail; be placed on community custody with the department for the maximum term sentenced under RCW 9.94A.712; and successfully complete an outpatient treatment program with Colson and Associates for a period of 36 months. CP 61-62.

As additional conditions, the court imposed inter alia:

e. The offender shall submit to, at his own expense, urinalysis at the direction of his Community Corrections Officer or Treatment Provider.

f. The offender shall not use, possess or deliver any controlled substance, except by valid prescriptions, and shall not possess or consume alcohol.

g. All conditions of treatment outlined on pp. 7-8 of the report of John W. Colson dated 3-9-06.

CP 62.

Relevant conditions outlined by Colson included:

2.) That Mr. Kohn participate and follow all treatment directives.

3.) That [in addition to sex offender treatment], Mr. Kohn also participate and continue with alcohol and drug treatment and participate in AA groups at a minimum of four times a week. In addition, he should be periodically tested via UA tests.

4.) That Mr. Kohn not have any contact with minors, that he should not have any relationship with any woman who has children and that this restriction continue until altered by his SOTP and CCO approval. Any dating or romantic relationship which he engages in should first be approved by his therapist.

CP 37-38.

2. Early Stages of SSOSA

Upon his release from the incarceration portion of his SSOSA, Kohn made some mistakes and had a number of community custody violations. However, these violations occurred before Kohn had his breakthrough in treatment, as later testified to by his treatment provider, Michael Morris. RP (10/9/10) 109-111.

First, the department alleged Kohn spent the night in a Moses Lake motel without prior approval on December 30, 2006. CP 141-142. Apparently, Kohn went to meet Bambi Wright.³ While Kohn was in the shower, Wright took his pants and wallet and fled. Police eventually caught her. Wright claimed Kohn raped her, but when Kohn offered to take a polygraph, she recanted. Police believed Wright made the allegation to forestall her arrest. CP 137-38, 141-142.

³ According to a letter Colson later wrote to the court, Kohn's relationship with Wright had not been approved by his treatment team, and Kohn was directed to stop seeing her on January 16, 2007. CP 143-45.

Second, the department alleged Kohn had failed to comply with recommended drug and alcohol treatment since November 20, 2006, and that he consumed cocaine on January 16, 2007. Although Kohn completed an alcohol and drug evaluation, he did not enter the recommended treatment program. Kohn explained to his CCO, Steven Clay, that he could not afford the program. Clay resolved to request funding, but could provide no guarantee. CP 137-39.

Regarding the cocaine allegation, Kohn passed a polygraph indicating he did not knowingly ingest it. He was treating a chipped tooth with medication he obtained previously (before his SSOSA) when he was still using drugs. His father retrieved the medication for the CCO, and it tested positive for cocaine. Id.

Third, the state alleged Kohn failed to comply with his sex offender treatment with Colson and Associates by failing to move to Spokane, and by his relationship with Wright. CP 146-148. Despite Colson's comments at sentencing seemingly approving of Kohn's relationship with Wright, Kohn was told to stop seeing her after the motel incident. Afterward, Kohn reportedly admitted seeing her at AA meetings and sitting by her. By the time of the

violation report, however, Kohn told his CCO he had stopped attending the same meetings as Wright. Id.⁴

The parties entered into a stipulated agreement, approved by the court, on June 1, 2007, disposing of the violations. CP 149-50. Kohn agreed he consumed cocaine on or about January 16, 2007, and agreed to serve 120 hours of community service to commence within one week of completion of his intensive outpatient treatment program. Violations 1 (Moses Lake motel) and 3 (failure to comply with sex offender treatment by relationship and failure to move) were dismissed. Id.

Early on in his treatment with Morris, Kohn also made some mistakes. Again, however, these occurred before he experienced a breakthrough in treatment. RP (10/9/09) 111.

In a report to the court, the state alleged Kohn consumed cocaine on August 21, 2007, travelled to Spokane without prior approval on August 19, 2007, and had contact with Wright on August 19. CP 151-156. Regarding the first allegation, Kohn

⁴ At the time of these three violations, Kohn was undergoing treatment in Spokane with Colson and Associates. CP 137-39. His counselor was Jodie Field. CP 146-48. Based on Kohn's reported difficulty finding work and housing in Spokane, where Colson and Associates was located, the court entered an order allowing Kohn to switch providers to Michael Morris in Moses Lake. CP 140; RP (10/9/09) 107. Historically, Kohn lived in a mobile home in nearby Othello and worked with his father full time at Sun Desert, a recreational park for retirees in Othello. CP 24-25, 71-72.

admitted he used cocaine, but said he was not with Wright at the time. Regarding the second and third allegation, Kohn's treatment provider, Michael Morris saw Kohn with Wright at Dick's restaurant in Spokane, despite having been instructed to remain within Grant and Adams Counties, and without permission to have contact with Wright. According to the CCO's report, Kohn admitted he went to Spokane with Wright. Id.

On October 5, 2007, the parties entered into a stipulated agreement, approved by the court, disposing of the violations. CP 74-75. Kohn admitted the violations and agreed to serve 30 days in jail per violation, for a total of 90 days. Id.

Following his release, Kohn contacted Wright one last time to return some personal items to her, since they were breaking up. CP 77. Although Kohn spent the night, they just talked. CP 77-78. The department alleged the contact constituted a violation of community custody and asked the court to revoke Kohn's SSOSA.⁵ CP 76-78. Kohn was taken into custody. CP 78; CP 157-58.

In May 2008, however, the parties entered into a stipulated agreement, approved by the court, disposing of the violations. CP 80. Kohn admitted he failed to comply with treatment conditions by

contacting Wright on November 22, 2007, and by failing to comply with sex offender registration requirements in Adams County on May 18, 2007. CP 80.

Regarding the latter, defense counsel later explained that Kohn made a technical mistake, but his location was never in question.

And he moved from Adams to Grant, he reported to Grant that he was going there, he told them when he left Adams that he was going there, and then he moved to Grant County, but the reporting statute says that you have to mail back a letter to the county that you moved out of telling them that you moved to the other county.

And Adams County violated him because even though Grant County notified them that he had gone to Grant County like he said, he failed to send that letter after he arrived here.

RP (10/9/10) 134. Kohn agreed to serve 180 days with credit for time served since December. Id.

3. Breakthrough in Treatment

What may have precipitated the parties' agreement was Kohn's "significant progress" in treatment. At the later hearing resulting in Kohn's SSOSA revocation and this appeal, Morris explained Kohn changed his attitude and made considerable progress in spring 2008.

⁵ According to CCO Clay, Morris stated he made it clear to Kohn he was to have

Q. [defense counsel] And with regards to those problematic behaviors, has he [Kohn] made progress since your letter back on February 15th, 2008?

A. [Morris] Yeah. Shortly after that Mr. Kohn and I had some rather intense sessions for about two consecutive months. I hit him pretty hard with denial. He made what I would consider significant progress.

Q. And now there seems to be a change in your feelings about Mr. Kohn. Is that a result of the progress that's made?

A. When I wrote that letter, I would have just as soon seen Mr. Kohn be incarcerated for the duration. I thought he was an extremely high risk to the community. Since then I believe he has – I believe he's changed his approach and attitude towards the community, towards himself, towards his victims. I think there's been a significant change, yes.

RP (10/9/09) 109.

And as Morris also explained, that process of change is “pretty standard for folks that succeed in treatment:”

Q. And in recognition of that and all that's occurred over the treatment period, including – it sounds like you kind of had a hard talk, I don't know, some people call them Come to Jesus meetings, with Mr. Kohn. Did you have an experience like that where you – the treatment hit a hard place and you worked with him?

A. We had about three weeks of that.

Q. And he progressed during that period?

no contact with Wright. CP 78.

A. Kicking and screaming.

Q. All right. And is that unusual as a treatment provider or ...

A. It's pretty standard for folks that succeed in treatment, that they go through that particular developmental – that process, that change.

RP (10/9/09) 111.

Kohn continued that change upon his release and return to the sex offender treatment program. As Morris wrote in his quarterly for April 1 - June 30, 2008:

Once again, Mr. Kohn has returned to the program. He is not [sic] longer a “know it all,” and does not attempt to dominate group with his imagined expertise. Instead, he is displaying some humility and willingness to take a look at himself.

CP 82. Kohn also resumed his work at Sun Desert as an equipment operator. CP 82.

For the next quarterly for July 1 – September 30, 2008,

Morris made similarly favorable observations:

There has been some improvement in Mr. Kohn's “know it all” attitude. He is working on learning rather than dominating the group process. Further, his disclosure and feedback is more reflective and self reflective than less judgmental and directive.

CP 88.

Again, for the period of October 1 – December 30, 2008,

Morris reported improvement:

At this time, Mr. Kohn continues to improve in his attitude and approach to treatment. Occasionally, he lectures and adopts a “superior and judgmental” position. With prompting, he changes. He is recognizing how he used these behaviors throughout his adult life to avoid accountability for his drug abuse and to set up his sexual assaults.

CP 91. Morris opined Kohn presented as a low risk to the community and was progressing at an acceptable rate. Kohn had completed his sexual timeline and autobiography and had set a time to present them to the group. CP 92.

4. Relapse

As is often the case for individuals who struggle with drug addiction, Kohn experienced a relapse and used methamphetamine on February 25, 2009. CP 95. As Kohn’s father would later explain at the revocation hearing, Kohn was “horribly depressed.” RP (10/9/09) 124. According to the department’s violation report, Kohn admitted relapsing after breaking up with his girlfriend.⁶ CP 95.

After his release on bond (RP (3/10/09) 6), Kohn checked into an inpatient drug/alcohol treatment program on March 23, 2009. CP 95. At the revocation hearing, Kohn’s CCO indicated

Kohn also sought mental health treatment. RP (10/9/09) 59. Nevertheless, the department recommended revocation of Kohn's SSOSA. CP 94-95.

In his quarterly report for April 1 – June 30, 2009, Morris noted Kohn had regressed somewhat:

At this point, Mr. Kohn continues to try and dominate the group with his "know it all" attitude. Unfortunately, this is not interpreting into real work. This had been addressed and will continue to be addressed in treatment. It is hampering his ability to progress.

CP 159-61.

While the revocation hearing was pending, Kohn suffered one final relapse and used methamphetamine on July 26, 2009. He also failed to call in for urinalysis testing on Monday, July 27, 2009, and on July 28, 2009. CP 121-122. As detailed in the CCO's report, Kohn admitted the violations, but explained there were extenuating circumstances:

I spoke with Mr. Kohn by telephone on 7/29/09. He admitted that he failed to report for urinalysis testing as required. He reported that he had relapsed but that was not the reason for his failure to report. He stated that he had gone off of his medication which caused him to relapse and that he was having serious mental health issues. He told me that he used methamphetamine but it was not his fault. He

⁶ Morris noted in his quarterly reports Kohn lived with a girlfriend; there was no allegation the relationship violated his treatment conditions. CP 91-92.

said that he hurt his back on Thursday or Friday and on Saturday the cat had knocked his medication (Zoloft) behind the television. He did not know where it was and could not move the furniture due to his back injury. His parents were gone for the weekend and he had an uncontrollable urge to use methamphetamine. He said that he used methamphetamine on Sunday 7/26/09.

CP 122.⁷

5. Revocation Hearing

The revocation hearing was held October 9, 2009. The state alleged three violations: (1) consuming methamphetamine on February 25, 2009; (2) failing to report for urinalysis testing on July 27 and July 28, 2009; and (3) using methamphetamine on July 26, 2007. CP 121-28.

The state called CCO Clay to testify about the violations and his recommendation for SSOSA revocation. RP (10/9/10) 32-67. On cross-examination, defense counsel sought to establish Kohn's low risk to the community, based on the lack of any offense-type behavior:

Q. You talk about the risk to children. Have you ever seen him, other than the violations that are noted in the file and are a matter of record,^[8] have you ever seen him around children?

⁷ At the revocation hearing, Kohn's CCO confirmed Kohn does indeed have a cat. RP (10/9/09) 53.

A. No, I haven't.

Q. Have you had reports that he's been around children other than the ones that have been previously adjudicated?

RP (10/9/09) 70-71.

At this point, the prosecutor objected the questioning was irrelevant. Defense counsel responded the questions went to Kohn's risk to the community. RP (10/9/09). Regarding relevance, the following colloquy occurred between the prosecutor and the court:

MR. MITCHELL: Your Honor, the allegations before the court are either dirty UAs for meth or failing to report for UA testing. . . .

THE COURT: Let me say this, I know where you're going, but I think it is relevant because one of the criteria is making satisfactory progress. And I wouldn't call it necessarily opening the door, but the state brought up the history of violations and I think that at least we should somewhat go over that. So . . .

. . .

MR. MITCHELL: I refer to 9A – 9.94A.670(10). "The court may revoke the suspended sentence at any time during the period . . . and order execution if:

⁸ From context, it appears that by "violations," counsel means the underlying offenses upon which the SSOSA was based. RP (10/9/09) 70-74. The only reference to inappropriate behavior around children while on community custody was in a letter from Morris, in which he described seeing Kohn and Wright in Spokane at Dick's Restaurant. According to Morris, Kohn acted inappropriately by not removing himself to his car while waiting for his food order, because there were children around. CP 110.

(a) the offender violates the conditions of the suspended sentence, or (b) the court finds that the offender is failing to make satisfactory progress in treatment.”

...

MR. MITCHELL: And at this point although one could conclude that a violation of conditions would satisfy an allegation that the offender is failing to make satisfactory progress, the only allegation before the court right now is that there's a violation of the conditions of sentence.

...

THE COURT: You're not asserting, then, that he's failing to make satisfactory progress?

MR. MITCHELL: It would overlap, but the direct – and that's a conclusion that the court can direct – can draw from –

THE COURT: No. My question is are you asking the court on the basis of failing to make satisfactory progress? It's a simple yes or no. You have a choice. It's either/or.

MR. MITCHELL: I guess I'm going to have to say yes that it would be both then, as to A and to B. It's an alternative pleading.

RP (10/9/09) 71-73. Based on this, the court ruled defense counsel could continue his line of inquiry. Id.

Clay acknowledged he received no reports of Kohn being around children, and that Kohn passed all of the department's random polygraphs. 74-76.

Following his brief relapse in July, Kohn continued sex offender treatment with Morris. RP (10/9/09) 89, 115. At the time of the revocation hearing, Kohn was doing well in treatment. As Morris testified:

In a nutshell, Brian's primary problem is a little kind of narcissistic arrogance. He has a bit of a know-it-all attitude. Which has a tendency to – he has a tendency to dominate sometimes in group. But that said, he also is a pretty bright guy, he demonstrates a good understanding of the material intellectually. He knows what high-risk situations are, high-risk thoughts, high-risk feelings, high-risk behaviors. Prognosis, if Brian can stay sober, I think he's pretty low risk.

RP (10/9/09) 85-86.

And in spite of the violations, Morris recommended Kohn continue in treatment:

I think at this point the prognosis for his success in treatment is good. Yes, I think it would be. I think continuing in treatment is a reasonable option.

RP (10/9/09) 89.

Morris testified a standard treatment period is 36 months. RP (10/9/09) 104. Although Kohn started treatment with Morris approximately 30 months before the date of the revocation hearing, he was incarcerated during nine of those months. And as the court characterized Morris' testimony, "you don't just start back up where

you left off.” RP (10/9/09) 113. Accordingly, Morris estimated Kohn would need another 18 months of treatment. RP (10/9/09) 113.

6. Court’s Ruling

Based on Kohn’s statements to his CCO, the court found the violations proven by a preponderance of the evidence. RP (10/9/09) 157. The court noted it had discretion to revoke based on the violations alone. Id. The court resolved, however, to “look at whether or not there’s been satisfactory progress.” Id. In the court’s opinion, there was not:

The defendant didn’t start with Mr. Morris until after his release and until after he had committed violations which resulted in the first two violations, that was consumption of cocaine which resulted in 32 hours of community service, and I think consumption of cocaine again, which resulted in 120 hours of community service, that order was entered on 6-1-07, but it was noted the use was actually before Mr. Morris started.^[9]

So when the defendant starts with Mr. Morris, he already has two violations. None of them have resulted in jail time yet. But there are two violations. And since the defendant started with Mr. Morris, which was two and a half years ago, in March of ’07,

⁹ The court’s “timeline” is incorrect. At about the time Kohn started with Morris, there were three alleged violations pending: staying outside his residence location; consuming cocaine in January 2007; and failing to comply with sex offender treatment by failing to move to Spokane and by his relationship with Wright. The parties entered into an agreement in June 2007, whereby Kohn admitted the cocaine violation, and the other two were dismissed. CP 149-50. Accordingly, Kohn did not have two violations when he started with Morris, nor did he have two violations for cocaine use at that time. For similar reasons, the court’s “timeline” set forth on pages 153-54 is also incorrect. See RP (10/9/09) 153-54.

or approximately 30 months ago, nine months have been in jail, or 30 percent of the time since he started with Mr. Morris have been in jail.

And again this does not take into account anything that occurred before Mr. Morris, when there were two violations also. So he's effectively had 21 months of treatment, nine months in jail. But Mr. Morris testified that one just doesn't pick up the sticks where they left off when they get out of jail and run from there. And these treatment programs contemplate, and this one did, at least three years of treatment. Although Mr. Morris has testified 18 more months are necessary.

Therefore, in the time that has transpired since the release in October of '06 from the judgment and sentence that was entered in April of '06, he was, again, released in October of '06, that's about three years – we're right about where we expected Mr. Kohn to be completed with his treatment. And instead, Mr. Morris tells us there's still 18 more months to go. So we're a little more than 50 percent complete where we were expecting to be 100 percent complete.

And it's my opinion that is not satisfactory progress and I will order that the suspended time will need to be reimposed in this case.

RP (10/9/09) 158-59.

D. ARGUMENT

1. THE COURT VIOLATED KOHN'S RIGHT TO DUE PROCESS WHEN IT REVOKED HIS SSOSA BASED ON AN UNCHARGED ALLEGATION.

In its violation report, the state alleged three violations relating to drug use and failing to report for urinalysis testing. The state did not allege Kohn was failing to make satisfactory progress

in sex offender treatment. Yet, midway through the revocation hearing, the state switched gears and, in response to questioning by the court, indicated it would rely on lack of treatment progress as an alternative basis to revoke Kohn's sentence. Although the court found the charged violations proven, it did not revoke Kohn's suspended sentence on that basis. Rather, the court noted it had discretion to do so, but instead chose "to look at whether or not there's been satisfactory progress." RP (10/9/09) 157.

Because Kohn (in the court's estimation) was "a little more than 50 percent complete where we were expecting [him] to be 100 percent complete," the court opined "that is not satisfactory progress" and revoked Kohn's suspended sentence. In so ruling, the court violated Kohn's right to due process, as he was never given notice that his sentence might be revoked based on this allegation. Because Kohn was not afforded an opportunity to marshal his evidence to defend against the allegation, this Court should reverse the revocation order and remand for a new, procedurally fair hearing.

An offender's SSOSA may be revoked at any time if a court is reasonably satisfied that an offender has violated a condition of his suspended sentence or failed to make satisfactory progress in

treatment. RCW 9.94A.670(10);¹⁰ State v. Dahl, 139 Wn.2d 678, 990 P.2d 396 (1999); State v. Badger, 64 Wn. App. 904, 908-09, 827 P.2d 318 (1992). Although revocation of a suspended sentence is not a criminal proceeding, an offender facing revocation is entitled to minimal due process rights. Dahl, 139 Wn.2d at 683.

Those rights include:

- (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.

Dahl, 139 Wn.2d at 683 (citing Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)).

The circumstances in Dahl are instructive. Dahl received a SSOSA after pleading guilty to sexually abusing his stepdaughter. After Dahl began treatment with Michael O'Connell and Associates, the state petitioned to revoke Dahl's SSOSA on grounds he was failing to make reasonable progress in treatment. The state had received a report from O'Connell indicating that Dahl might have a

¹⁰ For purposes of the issue raised herein, there is no significant difference between the SSOSA statute in effect between 2002 and 2003, 1997 and 1998, and the current version. Accordingly, this brief references the current version.

learning disorder, was not consistently taking his anti-compulsivity medication, and might be intentionally sabotaging his polygraph tests. After a hearing, the court ordered Dahl to serve 30 days of confinement and set a review hearing three months out; the court cautioned Dahl he must show discernable progress in treatment in order to maintain his SSOSA. Dahl, 139 Wn.2d at 680.

O'Connell submitted a treatment report in advance of the review hearing. The report recounted two incidents of concern to O'Connell. First, Dahl's CCO told O'Connell that two young girls had complained that a man fitting Dahl's description exposed himself to them near the site of Dahl's work release. O'Connell noted, however, that Dahl had shown truthful in a polygraph exam when he denied exposing himself to the girls. Dahl, at 681. Second, O'Connell reported that Dahl sent a note to a bank teller describing his sexual offense and recent fantasies. Dahl told O'Connell he was trying to reach out and develop a friendship with the woman. Dahl again showed truthful in a polygraph exam when he denied hoping to engage in sexual activity with the teller. O'Connell concluded that Dahl had made some progress, but continued to present a difficult case. Dahl, at 681.

Cf. RCW 9.94A.670; Laws of 2001, ch. 12, § 316; Former RCW

At the conclusion of the hearing, the court revoked Dahl's SSOSA. In her oral ruling, the trial judge noted that Dahl may suffer cognitive and physical impairments that hinder his progress. She also noted that Dahl's treatment providers had been unable to ascertain the reasons for his poor performance. The judge determined the letter to the teller showed that Dahl was unable to recognize sexually inappropriate behavior. But the judge also noted that the polygraph seemed to indicate Dahl was not involved in the exposure incident, although the judge remembered past polygraphs had been inaccurate. Dahl, at 682.

On appeal, Dahl argued the state's notice was inadequate because it cited as grounds for revocation only Dahl's failure to make satisfactory progress in treatment. Dahl argued the notice should have listed the exposure and note incidents as independent violations. Dahl, at 683-84. The court disagreed, however, reasoning that the exposure and note incidents were exemplary of Dahl's failure to make satisfactory progress in treatment rather than separate violations.

[T]he prosecutor did not represent the note and exposure incidents as independent violations of SSOSA. Rather, the State claimed that Dahl had

9.94A.120(8)(a)(v) (1998).

failed to make reasonable progress and supported this contention with myriad examples of his failure.

. . . The CCO also stated that she was “kind of appalled” at Dahl’s blatant disregard of the work release rules and his inability to account for his whereabouts when he was supposed to be at work through work release. Just as with the exposure and note incidents, these examples were not presented as specific violations of the conditions of his suspended sentence. Rather, they were mentioned as evidence of Dahl’s lack of progress after almost three years of treatment.

Due process requires that the State inform the offender of the specific violations alleged and the facts that the State will rely on to prove those violations. Here, Dahl was informed of the State’s contention that he had failed to make reasonable progress in his treatment program. He was also supplied with copies of the treatment provider reports, upon which the State relied to prove Dahl’s SSOSA violation. . . . Given that the State notified Dahl both of his alleged SSOSA violation and of the facts supporting the State’s claim, we hold that the notice provided to Dahl met minimal due process standards.

Dahl, 139 Wn.2d 678 (emphasis added).

Just as Dahl argued the state’s notice was inadequate for failing to allege the exposure and note incidents as separate violations, Kohn argues the state’s notice was inadequate because it failed to allege Kohn’s failure to make satisfactory progress in treatment as a basis to revoke. In contrast to Dahl, however, where the exposure and note incidents were not presented as separate violations, Kohn’s alleged failure to make satisfactory progress in

treatment was presented as an independent basis to revoke – separate and apart from the violations alleged. Hence, unlike Dahl, Kohn was not afforded proper notice.

After first recognizing “the only allegation before the court right now is that there’s a violation of the conditions of sentence,” the prosecutor completely switched gears and asserted the state was alleging failure to make satisfactory progress in treatment “as an alternative pleading.” RP (10/9/10) 72.

Kohn had no notice of this “alternative pleading.” And no notice the court might find a lack of satisfactory progress based on the disparity between the time initially estimated as necessary to complete the sex offender treatment program and the time Kohn still needed to complete it. Indeed, the only evidence Kohn had notice of regarding treatment was that he was doing well, as evidenced by Morris’ testimony. With proper notice of the allegation and supporting evidence, however, it is possible Kohn could have shown that it is not uncommon for a disparity to exist between the time needed to complete sex offender treatment estimated when the judgment and sentence is signed and the amount of time ultimately needed out in the real world. Because the state failed to give Kohn proper notice of the allegation, and the

court revoked Kohn's sentence based on the allegation, the revocation violated Kohn's due process right to notice.

For purposes of minimal due process, proper notice must set forth all alleged parole violations so that a defendant has the opportunity to marshal the facts in his defense. Morrissey, 408 U.S. at 489. Kohn was not allowed such an opportunity here. This Court should reverse. See Dahl, 139 Wn.2d at 689 (due process error not harmless where it affected court's decision to revoke).

2. KOHN'S INDETERMINATE SENTENCE FOR AN OFFENSE PREDATING THE NON-PERSISTENT OFFENDER STATUTE IS ILLEGAL.

Although the parties informed the court the count with an offense date between 1997 and 1998 predated former RCW 9.93A.712, and that it should be sentenced in accord with the law in effect at the time of the offense, the court refused to alter the original sentence and imposed an indeterminate sentence for both counts. CP 135-36; RP (10/9/09) 160-166. As a result, the sentence for count 1 on the judgment and sentence (count 2 on the information) remains unlawful and should be corrected.

An individual must be sentenced in accordance with the law in effect at the time of the offense. State v. Pillatos, 159 Wn.2d 459, 475, 150 P.3d 1130 (2007); RCW 9.94A.345. At the time of

Kohn's 1997/1998 offense, former RCW 9.94A.712, the non-persistent offender statute, did not exist. It was not enacted until 2001. Laws of 2001, ch. 12, § 303. Accordingly, the trial court erred in sentencing Kohn pursuant to this statute and in re-imposing the sentence once the SSOSA was revoked.

Courts have a duty and power to correct an erroneous sentence upon its discovery. In re Pers. Restraint of Call, 144 Wash.2d 315, 28 P.3d 709 (2001); see also In re Pers. Restraint of Goodwin, 146 Wash.2d 861, 866, 50 P.3d 618 (2002); RCW 10.73.090 (one-year time bar does not apply to judgment and sentence that is invalid in itself); McNutt v. Delmore, 47 Wash.2d 563, 565, 288 P.2d 848 (1955) ("When a sentence has been imposed for which there is no authority in law, the trial court has the power and duty to correct the erroneous sentence, when the error is discovered.") (emphasis omitted). Accordingly, this Court should reverse the unlawful sentence and remand for imposition of a sentence under the old sentencing structure of former RCW 9.94A.120 and former RCW 9.94A.310.

E. CONCLUSION

Because Kohn was given no notice he was failing to make satisfactory progress in treatment, and the court revoked his SSOSA on that basis, the revocation order violated Kohn's right to due process. This Court should remand for a new revocation hearing. This Court should also remand to correct the illegal sentence imposed on one of the counts.

Dated this 3rd day of June, 2010.

Respectfully submitted

NIELSEN, BROMAN & KOCH



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 28610-0-III
)	
BRIAN KOHN,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 4TH DAY OF JUNE, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **AMENDED BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] D ANGUS LEE
GRANT COUNTY PROSECUTOR'S OFFICE
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- [X] BRIAN KOHN
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SIGNED IN SEATTLE WASHINGTON, THIS 4TH DAY OF JUNE, 2010.

x *Patrick Mayovsky*