FILED

MAY 28, 2014

Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 32144-4-III

STATE OF WASHINGTON, Respondent,

v.

KEVIN BRYCE SNOW, Appellant.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

The State contends that Snow was not entitled to written notice of the alleged violations and that he received adequate verbal notice. The State's argument fails on two counts.

First, the State contends that *State v. Cassill-Skilton*, 122 Wn. App. 652, 94 P.3d 407 (2004) does not require written notice of the alleged violations prior to terminating a defendant from a drug court program, so long as the defendant has some form of notice. *Respondent's Brief* at 2. Taking the State's position at face value, it nevertheless fails in this case because the court in *Cassill-Skilton* plainly held that there must be a record that the defendant has notice of the violations. 122 Wn. App. at 653. No such record exists in this case because the drug court hearings were not reported; accordingly, the proceedings do not meet the due process standards set forth in *Cassill-Skilton.*

Second, the State attempts to overcome this shortcoming in its argument by alleging facts outside the record, without citation, to argue that Snow had notice even if not in writing. The State's factual assertions, unsupported by citation to the record, violate RAP 10.3(a)(6), which requires "references to relevant parts of the record," and RAP 10.3(a)(5), which provides that "[r]eference to the record must be included for each factual statement." The rule exists to enable efficient and expeditious

review of the accuracy of factual statements contained in briefs, and failure to comply with the rule is grounds for sanctions to be imposed, or for the court to decline to consider the unsupported statements made. *Hurlbert v. Gordon*, 64 Wn. App. 386, 400-01, 824 P.2d 1238 (1992); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Because the State's factual assertions are entirely without support in the record, the court should decline to consider them.

The State further argues that Snow waived his constitutional right to confront adverse witnesses by failing to object at the termination hearing, citing *State v. Sublett*, a case concerning objections to public trial rights. *Respondent's Brief* at 4. The State apparently overlooks the extensive authority permitting confrontation clause violations to be raised for the first time on appeal as manifest errors affecting a constitutional right. *See* RAP 2.5(a)(3); *see, e.g., State v. Lee*, 159 Wn. App. 795, 814, 247 P.3d 470 (2011); *State v. Kronich*, 160 Wn.2d 893, 900-01, 161 P.3d 982 (2007) (overruled on other grounds in *State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012)).

The introduction of testimonial hearsay in the present case is a manifest error affecting a constitutional right, and accordingly, can be raised for the first time on appeal. The four factors considered by Washington courts to determine whether the RAP 2.5(a)(3) standard is

met are set forth in *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992):

> First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis.

Here, the trial court's reliance on testimonial hearsay in the form of repeated factual reports from the treatment provider and drug test results introduced without any explanation of the procedure used, the chain of custody, or any opportunity for cross-examination comprised the entire basis for the drug court termination. RP 13-16. The State complains that Snow failed to state precisely which statements were problematic, but overlooks the simple fact that all of the facts relied upon by the trial court in its Order Terminating Defendant from Drug Court were ascertained from some other source than live testimony by witnesses with personal knowledge, subject to cross-examination. CP 24-25.

Applying the *Lynn* factors in this case, the alleged error is plainly constitutional in nature as it implicates Fifth Amendment confrontation

rights, and is manifest because the absence of live testimony had real, practical and identifiable consequences in the termination proceeding because if the hearsay evidence had been excluded, the State's case for termination "would have been fatally undermined." *Kronich*, 160 Wn.2d at 900.

Lastly, while the State correctly observes that Snow waived his right to challenge the State's evidence *as to the underlying charge*, the State makes no argument that the waiver somehow extends to Snow's right to challenge the State's evidence in support of termination from the drug court program. *Respondent's Brief* at 4. Indeed, such an argument would be plainly contradicted by the requirements set forth in *Cassill-Skilton* and *State v. Marino*, 100 Wn.2d 719, 725, 974 P.2d 171 (1994) that the State prove noncompliance with the agreement by a preponderance of the evidence.

VI. CONCLUSION

For the foregoing reasons, the proceedings terminating Snow from the drug court program violated his due process rights as well as his right to confront witnesses guaranteed by the Fifth Amendment to the U.S. Constitution. Accordingly, the order terminating him from the program and his judgment and sentence should be reversed.

RESPECTFULLY SUBMITTED this 28th day of May, 2014.

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DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Reply Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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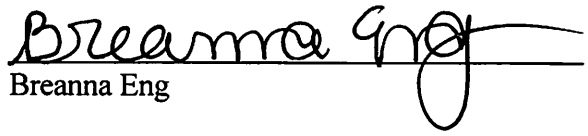
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 28th day of May, 2014 in Walla Walla, Washington.



Breanna Eng