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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JANELLE FRANCIS LELLI, Appellant.	No. 52110-5-II UNPUBLISHED OPINION

CRUSER, J. — Janelle Lelli appeals the revocation of her "Parenting Sentencing Alternative" (FOSA), former RCW 9.94A.655 (2010), sentence arguing that (1) the State failed to establish that she committed violations of her sentence conditions by a preponderance of the evidence and (2) she received ineffective assistance of counsel during her revocation proceedings because her attorney failed to call any expert witnesses to support the defense theory that the State's drug test evidence was unreliable.

The State counters that (1) it satisfied its burden of proof and the trial court did not abuse its discretion in revoking Lelli's FOSA and (2) Lelli did not receive ineffective assistance of counsel because there is no evidence that Lelli's attorney could have retained a helpful expert.

We hold that the State presented sufficient evidence of Lelli's violations to meet its burden of proof in a suspended sentence revocation hearing and the trial court did not abuse its discretion when it found that Lelli violated her FOSA conditions. We decline to address Lelli's ineffective

assistance of counsel claim because Lelli's claim requires us to consider evidence or facts outside of the record below. We affirm.

FACTS

I. SENTENCING

Lelli has struggled with methamphetamine dependency for over 20 years. Her criminal history contains multiple convictions for nonviolent felonies and misdemeanors spanning that same time frame. Through the Department of Corrections (DOC), Lelli participated in several substance abuse treatment programs, including during her "Drug Offender Sentencing Alternative," RCW 9.94A.660, sentence in 2006.

In June 2017, Lelli took three credit cards, an identification, and an electronic benefits transfer card that belonged to another parent at her daughter's school and made several unauthorized purchases. The State charged Lelli with six counts of second degree identity theft, two counts of forgery, and one count of second degree possession of stolen property. Lelli pleaded guilty to the charges and asked the trial court to impose the FOSA under former RCW 9.94A.655.

The DOC conducted a risk assessment to determine whether FOSA would be an appropriate sentence, and it ultimately recommended that the court grant a FOSA sentence. Over the State's objection, the trial court granted Lelli's request for a FOSA sentence on March 28, 2018. The trial court imposed 12 months of community custody and ordered Lelli to refrain from possessing or consuming all controlled substances, including marijuana and alcohol, and to comply with all FOSA parenting requirements.

II. DRUG TEST RESULTS

Lelli first tested positive for methamphetamine on March 29, 2018, the day after her FOSA sentence was entered and she was released from custody. The test was completed using an oral swab. DOC was limited to oral swab tests and could not conduct a urinalysis because Lelli's community corrections officer was a male, and urinalysis tests must be observed by a community corrections officer of the same gender.

Lelli's oral swab tests yielded mixed results in the several weeks that followed. On April 4, 2018, Lelli tested negative for all substances. On April 11, 2018, she again tested positive for methamphetamine. The oral swab collected on April 25, 2018 was negative for methamphetamine. On May 2, 2018, Lelli's results were positive for methamphetamine. Lelli tested negative for methamphetamine on May 9, 2018. Her final oral swab test, taken on May 16, 2018, came back positive for methamphetamine.

While in an intensive outpatient treatment program as part of her FOSA sentence, Lelli also submitted several urinalysis tests separate from the oral swabs collected by the DOC. Lelli tested positive for marijuana in the urinalysis collected on April 2, 2018. On April 26, 2018, Lelli's urinalysis did not detect any drug use. On May 11, 2018, Lelli's urinalysis was positive for hydrocodone, which was prescribed to her following her oral surgeries and that test did not detect the presence of any other substances.

III. FOSA REVOCATION

The community corrections officer initially assigned to Lelli's case, Everette Deveaux, filed the first notice of violation report on May 14, 2018. Deveaux's report identified two violations of Lelli's FOSA conditions: the April 2, 2018 urinalysis that was positive for marijuana

and the May 2, 2018 oral swab that was positive for methamphetamine. At that time, Deveaux recommended that Lelli receive "a substantial sanction" for the positive test results, but he did not recommend revocation of her FOSA. Clerk's Papers at 54.

But on May 23, 2018, after an oral swab collected on May 16, 2018 came back positive for methamphetamine, Deveaux recommended revocation of Lelli's FOSA. Lelli was arrested on that date and booked into jail to await determination of whether her suspended sentence would be converted into a prison sentence.

While Lelli was in custody awaiting disposition of her FOSA condition violations, her defense counsel ordered a hair strand drug test. The hair sample was collected on June 20, 2018, after Lelli had been in custody for four weeks following her arrest. The test did not detect the presence of any drugs, including methamphetamine and marijuana.

At the revocation hearing, the State called Daniel Ricketts, a technical manager at Cordant Health Solutions, the lab that performed the tests on Lelli's oral swab samples on behalf of the DOC. Ricketts explained that the lab reports a positive result after conducting two tests: one to first screen the sample and another to confirm a positive result. A positive oral swab test indicates methamphetamine use that has occurred between one to two days prior to collection, but use that occurred before that time period will not set off a positive result. For example, the May 2 and May 16 positive results indicate that there was a new use in between the two dates. When asked about the reliability of a urinalysis versus an oral swab, Ricketts stated that "both are reliable and accurate," but for a urinalysis, the detection window is longer than in an oral fluid test. Verbatim Report of Proceedings (VRP) (June 29, 2018) at 22.

Defense counsel elicited testimony from Ricketts regarding hair sample testing and though Ricketts was familiar with hair strand tests conceptually, he had never conducted one himself. Nor was he familiar with the specific type of test conducted by the lab to which Lelli sent her hair sample. Ricketts explained that hair follicles can reveal the presence of substances for 90 days preceding the test. But single use of a substance will not show up as positive, "so you need repeated exposure over that 90-day period in order to generate a positive result." *Id.* at 24. Because it takes more than a single use to generate a positive result in a hair test, it is "not uncommon for a person to give a positive urine or a positive oral fluid and have a negative hair result." *Id.* Such an occurrence is less likely where there are several positive oral fluid samples, though it is "certainly not impossible." *Id.* Ricketts was unable to specify how much consistent use was necessary to set off a positive result in a hair test.

Defense counsel also asked Ricketts whether someone who had a recent oral surgery might not be a good candidate for an oral swab test, but Ricketts stated he was not aware of any such limitation. Defense counsel then engaged in a line of questioning meant to ascertain whether a test might be positive for methamphetamine due to environmental factors or any other reason aside from illegal use of the drug. Ricketts maintained that only drug *use* will cause a positive result. He did not identify any other "environmental" factors that could lead to a positive result. *Id.* at 28.

In arguing against FOSA revocation, Lelli challenged the validity of the oral swab tests based on her assertion that she had undergone oral surgeries and on the negative hair strand test. Defense counsel noted that "[o]ther manufacturers" aside from Cordant "have recommended that [oral swab tests] not be used during oral surgery, but [she] was not able to find someone who was

available to testify." *Id.* at 61. The trial court asked when the oral surgeries took place, and defense counsel stated that Lelli informed her that the oral surgeries took place on April 27, 2018 and May 4, 2018.

The trial court was not persuaded that Lelli's oral swab results were compromised by the oral surgeries or that the hair strand test negated the positive results from the oral swabs. Instead, the trial court found that Lelli violated conditions of her FOSA based on (1) the positive urinalysis for marijuana on April 2, (2) the positive oral swab for methamphetamine on May 2, (3) the positive oral swab for methamphetamine on May 16, (4) the positive oral swab for methamphetamine on March 29, and (5) the positive oral swab for methamphetamine on April 11. The trial court revoked Lelli's suspended sentence and reinstated her sentence of 48 months confinement and one year of community custody.

DISCUSSION

I. SUFFICIENCY OF THE EVIDENCE

Lelli contends that the trial court failed to adequately consider the persuasive force of her negative hair strand test result, which showed no evidence of drug use for 90 days preceding collection of the sample. Lelli claims that if it were true that she used methamphetamine multiple times within this 90-day period, as the State asserts based on the oral swab tests, the hair test should have been positive for methamphetamine. Accordingly, she claims that the State's evidence did not satisfy the preponderance of the evidence standard required to revoke a suspended sentence.

We hold that the State met its burden of proving Lelli's violations by a preponderance of the evidence given the number of violations established with sufficient reliability by the oral swab

tests. Accordingly, we hold that the trial court did not abuse its discretion when it found that Lelli violated her FOSA conditions.

A. LEGAL PRINCIPLES

The trial court retains discretion to revoke a suspended sentence based on a violation of a condition to that sentence, and the decision to revoke "will not be disturbed absent an abuse of discretion." *State v. McCormick*, 166 Wn.2d 689, 705-06, 213 P.3d 32 (2009). "An abuse of discretion occurs only when the decision of the court is 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Id.* at 706 (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

An individual "'facing revocation of a suspended sentence has only minimal due process rights'" because a revocation hearing is not a criminal proceeding. *In re Pers. Restraint of Schley*, 191 Wn.2d 278, 286, 421 P.3d 951 (2018) (plurality opinion) (quoting *State v. Dahl*, 139 Wn.2d 678, 683, 990 P.2d 396 (1999)). Violations need not be proven beyond a reasonable doubt; instead, the "[DOC] has the burden to prove each violation allegation by a preponderance of the evidence." *Id.* (citing WAC 137-104-050(14)). "That standard requires 'that the evidence establish the proposition at issue is more probably true than not true.'" *Id.* at 287 (quoting *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005)).

B. ANALYSIS

The four oral swab tests that were positive for methamphetamine, the urinalysis that tested positive for marijuana, and the expert testimony from Ricketts relating to the same constitute sufficient evidence that Lelli violated her FOSA conditions to meet the preponderance of the evidence burden of proof. *See Id.* at 286. On review, we "defer[ ] to the fact finder on issues of

conflicting testimony, witness credibility, and persuasiveness of the evidence." *State v. Trey M.*, 186 Wn.2d 884, 905, 383 P.3d 474 (2016), *cert. denied*, 138 S. Ct. 313 (2017).

Here, the reliability of both oral fluid and urinalysis testing methods was established by Ricketts's testimony and was uncontroverted by any other evidence. Lelli's claim that the oral swab results were invalid because she could not have used methamphetamine multiple times and still had a negative hair test is not supported in the record. Instead, Ricketts testified that although he would expect several positive oral swabs to set off a positive hair result, a negative hair test is "certainly not impossible." VRP (June 29, 2018) at 24. "Fact finders are in the best position to resolve issues of credibility and determine how much weight to give evidence because they see and hear the witnesses." *In re Det. of Stout*, 159 Wn.2d 357, 382, 150 P.3d 86 (2007) (Madsen, J., concurring) (citing *State v. Maxfield*, 125 Wn.2d 378, 385, 886 P.2d 123 (1994)). Accordingly, we are bound by the trial court's weighing of the evidence and its credibility determinations. We will not disturb the trial court's determination that Ricketts's testimony was credible or that the negative hair test carried less evidentiary weight than the several positive oral swabs and the urinalysis.

Given that we must defer to the trial court on issues of witness credibility and weight of the evidence, the multiple positive drug tests are sufficient to establish, by a preponderance of the evidence, that Lelli violated conditions of her FOSA despite the negative hair test. *See Schley*, 191 Wn.2d at 287 (quoting *Mohr*, 153 Wn.2d at 822). Therefore, the trial court's decision to revoke Lelli's FOSA was not "'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *McCormick*, 166 Wn.2d at 706 (quoting *State ex rel. Carroll*, 79 Wn.2d at 26). The trial court did not abuse its discretion in revoking Lelli's suspended sentence.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Lelli asserts that her counsel was ineffective at the revocation hearing. She claims her counsel's performance was deficient because there was no strategic or tactical reason for the failure to call an expert witness to support the defense theory of the case. Lelli further maintains that she was prejudiced by this failure because if a proper expert had been retained, the trial court would not have revoked her suspended sentence on the "suspect" oral swabs and would have lent more weight to the negative hair test. Br. of Appellant at 13.

We decline to decide this issue on the merits because determining whether counsel's performance was deficient would require us to go beyond the record in this appeal.

A. LEGAL PRINCIPLES

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015).

Because an ineffective assistance of counsel claim presents mixed questions of law and fact, we review the claim de novo. *State v. Linville*, 191 Wn.2d 513, 518, 423 P.3d 842 (2018). To prevail, Lelli has the burden of showing both that (1) her counsel's representation was deficient because it fell below an objective standard of reasonableness and (2) that she was prejudiced by this deficient performance. *Id.* If Lelli fails to satisfy one prong of this two-part test, we need not consider the other. *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 847, 280 P.3d 1102 (2012).

An attorney's performance will not be considered deficient if the attorney "investigated the case and made an *informed* and reasonable decision" not to call a particular witness. *Jones*, 183

Wn.2d at 340. But when the attorney "makes strategic choices 'after less than complete investigation,' . . . a reviewing court will consider them reasonable only 'to the extent that reasonable professional judgments support the limitations on investigation.'" *State v. Fedoruk*, 184 Wn. App. 866, 880-81, 339 P.3d 233 (2014) (quoting *Strickland*, 466 U.S. at 690-91). A reasonable investigation "includes expert assistance necessary to an adequate defense." *State v. Punsalan*, 156 Wn.2d 875, 878, 133 P.3d 934 (2006).

To show prejudice, a defendant must establish that "there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). A reasonable probability "is a probability sufficient to undermine confidence in the outcome." *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017).

"[W]hen 'the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record.'" *Linville*, 191 Wn.2d at 525 (quoting *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)). Therefore, if "a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition, which may be filed [and heard] concurrently with the direct appeal.'" *Id.* (alteration in original) (quoting *McFarland*, 127 Wn.2d at 335).

B. DEFICIENT PERFORMANCE

The defendant has the burden of establishing deficient performance based on the record below. *McFarland*, 127 Wn.2d at 335. And because there is a presumption that the representation was effective, "the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." *Id.* at 336.

Here, the only evidence regarding defense counsel's decision not to call an expert was her statement that "[o]ther manufacturers . . . have recommended that [oral swab tests] not be used during oral surgery, but [she] was not able to find someone who was available to testify." VRP (June 29, 2018) at 61. There is no evidence in the record regarding what kind of investigation effort defense counsel expended in seeking expert testimony. And there is no evidence in the record that an expert would have been available if not for some logistical inconvenience that defense counsel failed to resolve by requesting a continuance or obtaining an affidavit. Determining whether defense counsel's performance was deficient would require us to assume the existence of a favorable expert without any evidence to support that fact in the record below.

Thus, it is impossible to tell, based on this record, whether defense counsel's failure to retain an expert was deficient performance or whether she engaged in a reasonable, if unsuccessful, investigation under the circumstances. However, if an expert was available, the appropriate means of presenting this issue would be through a collateral challenge and not in this direct appeal. *See Linville*, 191 Wn.2d at 525. Because Lelli did not establish deficient performance on the record provided, we do not address whether she suffered prejudice. *See Crace*, 174 Wn.2d at 847.

CONCLUSION

We hold that the State met its burden of proof and established Lelli's FOSA violations by a preponderance of the evidence. The trial court did not abuse its discretion when it found that Lelli violated her FOSA conditions based on this evidence. We also decline to reach the merits on

Lelli's ineffective assistance of counsel claim because we cannot determine whether counsel's performance was deficient on this record. We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

CRUSER, J.

We concur:

WORSWICK, P.J.

SUTTON, J.