

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

WARREN MATTHEW HELZER,

Appellant.

No. 41435-0-II

UNPUBLISHED OPINION

Penoyar, C.J. — Warren Matthew Helzer appeals the trial court’s order revoking his SSOSA (Special Sex Offender Sentencing Alternative, *see* RCW 9.94A.670). He contends that the trial court revoked his suspended sentence on invalid grounds and denied him due process. We affirm.

Facts

Helzer pleaded guilty to three counts of first degree child molestation on December 16, 2009.¹ On February 5, 2010, the trial court imposed a SSOSA, suspending Helzer’s 130-month sentence and permitting him to live in the community on conditions, including that he complete a sex offender treatment program with treatment provider Maureen Saylor and that he abide by all rules Saylor sets and abide by all his community corrections officer’s (CCO) conditions.²

¹ The charges stemmed from Helzer’s repeated sexual abuse of his daughter and two sons over the course of several years when the children were between four and six years old.

² “The defendant shall attend and complete sexual deviancy treatment with: Maureen Saylor.” CP at 18. “The defendant shall follow all rules set forth by the treatment provider.” CP at 18.

Six months later, on August 12, 2010, the State filed a petition for hearing to determine whether Helzer was out of compliance with a condition of his suspended sentence. The petition alleged that Helzer “failed to comply with sexual deviancy treatment resulting in termination ... on or about 8/11/10.” CP at 21. Saylor filed a report in support of the treatment-related violation on September 1, 2010.

A hearing was held on October 22, 2010, to address Helzer’s termination from SSOSA treatment. The information before the court showed that Helzer violated Saylor’s rules and repeatedly challenged her authority to impose treatment-related limitations on his behavior.³ During the time between his release from custody on June 14, 2010, and his termination from treatment on August 11, 2010, Helzer 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. When Saylor attempted to hold Helzer accountable to his treatment conditions, Helzer became “upset,” said “it wasn’t fair,” and told Saylor that he did not want to remain in therapy with her because the process was “punitive.” Clerk’s Papers (CP) at 28. Helzer also disclosed that he was considering an alternative treatment provider. Saylor reminded Helzer that he was not to change treatment providers without a court order.

³ The State and Helzer relied on Saylor’s September 1, 2010 termination from treatment report at the revocation hearing. Saylor was ill and unable to attend the hearing, but Helzer’s CCO, Mike Cheney, attended the hearing, answered the court’s questions, and spoke on behalf of revocation. Helzer’s counsel specifically acknowledged that the court should consider Saylor’s report for purposes of the revocation hearing.

At Helzer's next treatment meeting, he implied he had a right to change treatment providers, expressed his intent to do so, and asked Saylor about the consequences. Saylor told Helzer that she could not continue to treat him because he challenged her rules. Helzer became angry and told Saylor she was "trying to screw him." CP at 29. Helzer then "rant[ed]" about the alleged inequity of Saylor's rules, claimed she was "violating his civil rights," and said he was going to hire a lawyer to sue her. CP at 29. Saylor then told Helzer that she was terminating his treatment.

Cheney told the court about the difficulties between Helzer and Saylor stemming from Helzer's "disregard for the treatment provider's directives." Report of Proceedings (RP) at 7. Cheney also explained to the court that Helzer made telephone calls to his sister-in-law in violation of a no contact order.

Following the presentation of evidence, the sentencing court recalled its concern that Helzer would obstinately attempt to dictate his treatment conditions.⁴ The sentencing court then recalled that it had warned Helzer that, given his profile and the court's concerns, he had only one opportunity to make SSOSA work. The court also recalled that Helzer acknowledged that he understood he would only have one chance, and that Helzer assured the court that he would be successful. Finding that Helzer had engaged in exactly the kind of oppositional behavior that concerned the court at the outset of Helzer's SSOSA, the trial court revoked Helzer's suspended sentence because of his termination from treatment. Helzer appeals.

⁴ The court recalled, "I asked you . . . [a]re you going to be oppositional, are you going to create your own set of rules . . . [a]nd your response was . . .no." RP at 22.

analysis

I. Fact-Based Challenges

Helzer first contends that the trial court erred in revoking his SSOSA suspended sentence “simply because [he] stated he wanted to change treatment providers.” Appellant’s Br. at 5. We disagree.

We review a trial court’s decision to revoke a SSOSA suspended sentence for an abuse of discretion. *State v. Miller*, 159 Wn. App. 911, 918, 247 P.3d 457 (citing *State v. Partee*, 141 Wn. App. 355, 361, 170 P.3d 60 (2007)), *review denied*, 172 Wn.2d 1010 (2011). A trial court abuses its discretion only where the trial court’s decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Miller*, 159 Wn. App. at 918 (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). *See also State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001) (trial court abuses its discretion only if no reasonable person would adopt the view espoused by the trial court).

The SSOSA statute provides that a sentencing court may suspend the sentence of a first-time sexual offender if the offender is shown to be amenable to treatment. *Miller*, 159 Wn. App. at 917 (citing RCW 9.94A.670). A SSOSA sentence may be revoked at any time where there is sufficient proof to reasonably satisfy the trial court that the defendant has violated a condition of the suspended sentence or has failed to make satisfactory progress in treatment. *Miller*, 159 Wn. App. at 917-18 (citing *State v. McCormick*, 166 Wn.2d 689, 705, 213 P.3d 32 (2009); RCW 9.94A.670(10); former RCW 9.94A.120(8)(a)(iv) (1998)). Once a SSOSA is revoked, the original sentence is reinstated. *Miller*, 159 Wn. App. at 918; *State v. Dahl*, 139 Wn.2d 678, 683, 990 P.2d 396 (1999).

Here, Helzer mischaracterizes the record, arguing that the only stated basis for Saylor's termination of Helzer's treatment was his desire to change treatment providers. But a fair reading of Saylor's termination report reveals that what prompted Helzer to consider a different therapist were Saylor's attempts to hold him accountable for failing to comply with Saylor's treatment conditions and rules. As explained below, Helzer's noncompliance with Saylor's imposed treatment rules and conditions is the basis for Helzer's termination from treatment, rather than Helzer's expressed desire to seek treatment from another provider, as he contends.

The trial court had before it Saylor's termination report and specifically asked Helzer's counsel, "[I]s there any reason I ought not to be considering it for purposes of this hearing?" RP at 6. Counsel responded, "No." RP at 6. In explaining her decision to terminate Helzer's treatment, Saylor's report included a background that listed several of Helzer's noncompliant behaviors, including his continued sexual relationship with a named individual despite Saylor's previously prohibiting that sexual relationship. Saylor reiterated that Helzer must abide by her rules and conditions, but he responded that he "didn't share [her] view." CP at 27.

Saylor's report also noted that Helzer had telephoned his sister-in-law, asking about his wife and children in violation of a no contact order. Saylor reminded Helzer that the no contact order that had been in place since before Helzer's sentencing prohibited such third party contacts with his wife and children.

Saylor's report also noted how Helzer balked at Saylor's restrictions on his clothing. When Saylor prohibited Helzer from wearing a very short mini skirt, which may prompt his

exposing himself, he complained that “it wasn’t fair,” that “he liked the skirt and liked to show off his legs.” CP at 28. Helzer became upset, describing Saylor’s conditions as “punitive,” and at that time raised the issue of going to another therapist, Robert Hirsch, who Helzer said “worked with clients using love and spirituality.” CP at 28. Saylor explained to Helzer that he would have to go back to court for an order approving a change of therapist. She gave him a week to decide what he wanted to do: continue treatment with her or seek a court order to change therapists. The following week, Helzer said he intended to seek treatment with a different therapist and Saylor terminated his treatment.

While it is true that Helzer’s termination from treatment followed his decision to seek another therapist, Saylor’s report indicates that her reason for terminating Helzer was that, in light of Helzer’s continued questioning of the rules, Saylor was no longer willing to treat Helzer as he looked for another therapist. Saylor lacked confidence that Helzer would comply with her expectations (and the court’s expectations while Saylor was identified as his treatment provider).

Helzer’s factual contention—that the only stated basis for Saylor’s termination of Helzer’s treatment was his desire to change treatment providers—fails.

Helzer next contends that “[a]n order revoking [his] SSOSA for any reason other than the narrow one allowed in the violation report would be invalid.” Appellant’s Br. at 7. Again,

Helzer's foundational argument is that the only basis stated in Saylor's report for Helzer's termination from treatment was Helzer's request for a different therapist. But, as discussed above, Saylor's report is not so limited, and for that reason, Helzer's argument fails.⁵

II. Violation s of SSOSA Conditions

Citing *Dahl*, 139 Wn.2d at 683, Helzer correctly acknowledges that “[a] SSOSA may be revoked if a court is reasonably satisfied that an offender has not progressed satisfactorily in treatment *or has violated a condition of his suspended sentence.*” Appellant's Br. at 8 (emphasis added). Here, the latter basis justifying revocation is met and is dispositive of Helzer's appeal. We may sustain the trial court on any correct ground, even if it was not considered by the trial court. *State v. Donahue*, 105 Wn. App. 67, 79, 18 P.3d 608 (2001); *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986).

The record contains ample grounds for revoking Helzer's SSOSA. The conditions listed in Helzer's SSOSA sentence specifically stated that he was to “[u]ndergo and successfully complete an outpatient sex offender treatment program with Maureen Saylor for a period of 3-5

⁵ The State characterizes Helzer's argument as asserting limited notice, contending that Helzer's contention is that the only notice he received concerning the basis for his treatment termination was his request for another treatment provider. Such characterization does not change the result. The State's petition for revocation hearing identified the basis of the suspended sentence violation as “Defendant has *failed to comply with sexual deviancy treatment* resulting in termination for sexual deviancy treatment on or about 8/11/10, in Pierce County, Washington; and that the foregoing acts and deeds were committed subsequent to and in direct violation of the *terms and conditions* of the aforementioned sentence.” CP at 21 (emphasis added). Nothing in this language limits or even identifies the basis of the petition as Helzer's request for another treatment provider. In fact, the petition expressly states that the basis for the petition is Helzer's failure to comply with sexual deviancy treatment. As discussed above, Saylor's termination from treatment report, which Helzer received as part of the revocation hearing process, explains such failure as Helzer's noncompliance with treatment rules that Saylor attempted to enforce. Accordingly, Helzer's narrow basis (or limited notice) argument also fails.

years.” CP at 12. *See also* CP at 18 (“The defendant shall attend and complete sexual deviancy treatment with: Maureen Saylor.”). Helzer did not do so.

Helzer’s SSOSA conditions also stated: “The defendant shall follow all rules set forth by the treatment provider.” CP at 18. As discussed above, Helzer did not do so.

The listed conditions also stated: “The defendant shall not have any contact with the victim(s).” CP at 18. *See also* CP at 80 (Appendix H at (b)(14) stating that defendant shall “[h]ave no contact with the victims to include but not limited to in-person, written, or third-party.”). At the revocation hearing CCO Cheney addressed the court, noting that Helzer had made telephone calls to his in-laws in Iowa despite a no contact order. Cheney said, “My phone was ringing off the hook, complaining about [Helzer] calling out there to his sister-in-law, when there was a no-contact order in effect between Mr. Helzer and his ex-wife and the victims.” RP at 8. Cheney said when he asked Helzer about the telephone calls, Helzer said that he “wanted them to know he was doing okay.”⁶ RP at 8.

Any of these violations of Helzer’s suspended sentence conditions would serve as a valid basis for revoking Helzer’s SSOSA. *Dahl*, 139 Wn.2d at 683. All were before the trial court. Under these circumstances, we cannot say that the trial court abused its discretion in revoking Helzer’s SSOSA.

⁶ Saylor’s termination report also noted Helzer’s telephone calls to his sister-in-law asking about his wife and children in violation of a no contact order.

III. Due Process

Helzer alternatively contends that the revocation proceeding denied him due process. We disagree.

As our Supreme Court explained in *Dahl*, the revocation of a suspended sentence is not a criminal proceeding. *Dahl*, 139 Wn.2d at 683. Thus, the due process rights afforded at a revocation hearing are not the same as those afforded at the time of trial. *Dahl*, 139 Wn.2d at 683. An offender facing revocation of a suspended sentence has only minimal due process rights. *Dahl*, 139 Wn.2d at 683. Sex offenders who face SSOSA revocation are entitled to the same minimal due process rights as those afforded during a probation or parole revocation. *Dahl*, 139 Wn.2d at 683.

The *Dahl* court adopted the minimal due process afforded in parole violation proceedings, as articulated in *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972), for application in the SSOSA context. *Dahl*, 139 Wn.2d at 683. Accordingly, minimal due process for SSOSA revocation proceedings 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 court statement as to the evidence relied upon and the reasons for the revocation. *Dahl*, 139 Wn.2d at 683 (citing *Morrissey*, 408 U.S. at 489). These requirements exist to ensure that the finding of a violation of a term of a suspended sentence will be based on verified facts. *Dahl*, 139 Wn.2d at 683; *Morrissey*, 408 U.S. at 484.

Here, these criteria are met. Helzer received written notice of alleged violations and disclosure of evidence in the form of the State's petition for revocation hearing and Saylor's termination report. At the hearing, Helzer's counsel had the opportunity to confront and question witnesses.⁷ Helzer also had a neutral magistrate that stated reasons for his decision. Accordingly, Helzer was afforded all the due process he was entitled to.

Helzer argues, however, that the court's oral ruling is inadequate, contending that it fails to establish the exact basis for the revocation. But that is not so. The trial judge went on at length to explain to Helzer why he was revoking the SSOSA, stating as follows:

The Court: Okay. Do you remember the sentencing, and the dialogue you and I had?

The Defendant [Helzer]: Yes, sir.

The Court: Okay. Because I want to recall that a little bit. One of the concerns raised at the time of sentencing was, are you going to go off on your own sense of what you want to do, when you want to comply, when you don't want to comply, when you think the rules apply to you, when you don't. And so I questioned you about that, and I asked you if that was going to be a problem. Are you going to be oppositional, are you going to create your own set of rules, and are we setting up a recipe for disaster here. And your response was that, no, you understood.

And I went a step further, and I said I understood that treatment was an up and down thing, that you would take maybe two steps forward, one step back. And I said, unfortunately for you, given the profile and given the concerns, that's not going to be available for you. You are going to be a one-time, one-shot, one-chance only SSOSA recipient. And you said you understood that. And you said you could go ahead and be successful.

⁷ As for use of Saylor's report at the hearing, Helzer's counsel did not object, but affirmatively acknowledged to the court that it should use the report. Both parties heavily relied on Saylor's report at the revocation hearing. Thus, any challenge to the reliance on Saylor's report is waived. "A '[d]efendant's failure to object to a violation of due process and his own use of hearsay during argument constitute[s] a waiver of any right of confrontation and cross examination.'" *Dahl*, 139 Wn.2d at 687 n.2 (quoting *State v. Nelson*, 103 Wn.2d 760, 766, 697 P.2d 579 (1985)).

Now what have I got? Do I have a situation where this is just a bad fit between you and Ms. [Saylor], or is it more than that? Is it you putting yourself in a position where you got terminated and here's what Mr. [Hirsch] writes. This is not Ms. [Saylor], this is not Mr. Cheney, it's not the State. This is Mr. [Hirsch], who you said you could work with. Here's how he responds in the letter that was submitted to me as to what he looks at when he sees what Ms. [Saylor] did in terminating you.

He says, "Ms. [Saylor] outlines in her termination report ample reasons to let Mr. Helzer go. His attitude and behavior did not reflect a client who was committed to the program and her rules. That Mr. Helzer contacted his sister[-in-law] in Iowa to inquire about his ex-wife and child is a serious violation. I also understand Ms. [Saylor]'s concern about Mr. Helzer's desire to continue having a sexual relationship with Ms. Porter. And I share Ms. [Saylor]'s and his CCO's opinion that Mr. Helzer should not be wearing mini skirts." So all that [sic] are problems identified by Mr. [Hirsch], reasons that justify what Ms. [Saylor] did.

You and I had, in effect, a contract. We talked about this. You knew what the result was going to be if you got into trouble, and you needed to go about this in the proper way. You did exactly what was projected to be the problem with this. You just 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.

You know, it's tough revoking these things. It's tough seeing people not succeed. I don't want that to happen, but it's both a situation of I have to protect the community, and I have to protect the integrity of this system. When I tell you something's going to happen if you mess up, and you messed up big time.

I'm sorry, but the SSOSA is revoked.

RP at 21-24. Clearly, the court stated specific reasons for the revocation. It relied on Helzer's oppositional attitude and behavior, as expressed in Hirsch's letter, and the "ample reasons" outlined in Saylor's report, as reiterated in Hirsch's letter, including Helzer's improper contacts with in-laws and his continuation of an improper sexual relationship. We reject Helzer's contention that the trial court failed to articulate specific reasons for revocation.

Finally, Helzer seeks to belatedly limit Saylor's report as hearsay. Helzer argues that Saylor's termination report should be considered only for the limited purpose of showing that Saylor terminated Helzer's treatment because he was seeking another treatment provider. Helzer

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contends that he did not agree to admission of Saylor's hearsay report for any other purposes.

We disagree.

As noted, the trial court expressly asked Helzer's counsel if there were "any reason" the court ought not to consider Saylor's termination report for purposes of the revocation hearing. RP at 6. Helzer's counsel said no and proceeded to rely on the report during the proceeding. Counsel had the opportunity to limit the report's use, but did not, and thereafter relied on the report in argument. Helzer cannot now challenge the report's admission or use it as improper hearsay. *See Dahl*, 139 Wn.2d at 687 n.2.⁸

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 pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We Concur:

Armstrong, J.

⁸ Moreover, our Supreme Court has explained in the probation context that while "[u]nreliable hearsay may not be the sole basis for revocation of probation," the use of similar reports by mental health therapists that are corroborated by other witness statements may be used at probation revocation hearings. *See Nelson*, 103 Wn.2d at 765 (where hearsay reports that probationer failed in-patient sexual psychopathy program at state hospital was demonstrably reliable, use of that evidence to revoke probation did not deny probationer due process).

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Quinn-Brintnall, J.