IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29426-9-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
LEILANI MARIANO DIMISILLO,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Siddoway, J. — Leilani Dimisillo appeals the juvenile court's decision to revoke her SSODA[1] sentence, arguing that the court improperly admitted hearsay in violation of her confrontation right during the revocation hearing. For reasons explained below, we dismiss the matter as moot.

FACTS AND PROCEDURAL BACKGROUND

In July 2009, Ms. Dimisillo, a juvenile, pleaded guilty to third degree assault with sexual motivation and was sentenced to 40 weeks in a juvenile rehabilitation administration (JRA) facility, which was conditionally suspended by a court-ordered

[1] Special sex offender disposition alternative, RCW 13.40.160.

SSODA. Among the conditions imposed by the court's disposition order were that Ms. Dimisillo commit no new offenses, regularly report to her probation officer, observe a curfew, refrain from drug or alcohol use, submit to regular polygraph examinations, and participate in 24 months of sex offender treatment.

In September 2010, the State moved for revocation of the SSODA, alleging that Ms. Dimisillo had failed to maintain contact with her probation counselor, attend sex offender treatment, and comply with curfew.

At the revocation hearing, Ms. Dimisillo's probation officer, Priscilla Hannon, and her therapist, Terry Peterson, both testified that Ms. Dimisillo had missed treatment appointments in August 2010. Both testified that Ms. Dimisillo, who had been living apart from her parents for several years, had been asked to leave each of the four residential placements identified following the order of disposition, and they knew of no other placement for her. Ms. Hannon testified that Ms. Dimisillo had failed to report to her and had been arrested for assault and theft. Ms. Dimisillo admitted during the hearing to using drugs while enrolled in treatment, failing to attend scheduled polygraph tests, and having difficulties maintaining her placements.

Several hearsay statements were elicited by the State and objected to by Ms. Dimisillo during the hearing. Ms. Hannon testified that she was told by Alison Hargraves that Ms. Dimisillo's placement with her did not work out because Ms. Hargraves learned

Ms. Dimisillo was having sex with a friend's 22-year-old brother; behavior that violated Ms. Hargraves' religious principles. Ms. Hannon testified to statements by Ms. Dimisillo's mother that Ms. Dimisillo was not in Seattle during a time frame Ms. Dimisillo had claimed that she *was* in Seattle, offering the ostensible time out-of-town as an excuse for missing therapy and polygraph appointments. Ms. Hannon also testified to reports from a detention supervisor that Ms. Dimisillo had been mistreated by juvenile detention center staff and involved in the theft of a cell phone.

In objecting to one of the first instances of hearsay, Ms. Dimisillo's lawyer stated, "There is a right of confrontation," Report of Proceedings (RP) at 13, but he otherwise objected, then and later, only on hearsay grounds. The prosecutor's consistent response to the hearsay objections was that the court had discretion to admit the evidence, citing ER 1101.[2] The trial court overruled many, but not all, of Ms. Dimisillo's hearsay objections on this basis.

The court granted the State's request that it revoke Ms. Dimisillo's SSODA, entering written findings that Ms. Dimisillo had violated the terms and conditions of the sentencing alternative by failing to report to her probation officer, failing to meet with her treatment provider, using drugs and alcohol, failing to maintain a placement, and noting

[2] ER 1101(c)(3) provides, "The rules (other than with respect to privileges, the rape shield statute and ER 412) need not be applied in the following situations . . . sentencing, or granting or revoking probation."

criminal referrals to the court.

Ms. Dimisillo timely appealed.

ANALYSIS

Ms. Dimisillo argues that she was denied due process of law when the trial court admitted hearsay through the testimony of her probation officer. The State responds that the hearsay statements were reliable and therefore admissible at such a hearing, and that any error was harmless because the trial court revoked probation for reasons that did not rely upon the hearsay evidence.

SSODA, the juvenile equivalent of the special sex offender sentencing alternative (SSOSA), RCW 9.94A.670, provides that a sentencing court may suspend the sentence of a first time juvenile sex offender if the offender is shown to be amenable to treatment. Former RCW 13.40.160(3) (2004). A SSODA may be revoked at any time if there is proof to satisfy the court that the offender has violated a condition of the suspended sentence or failed to make satisfactory progress in treatment. *Id.*; *see State v. Badger*, 64 Wn. App. 904, 908, 827 P.2d 318 (1992) (discussing SSOSA) (quoting *State v. Kuhn*, 81 Wn.2d 648, 650, 503 P.2d 1061 (1972)).

Because the revocation of an alternative sentence is not a criminal proceeding, due process rights afforded a sexual offender facing revocation are not the same as those afforded at the criminal trial. *See State v. Dahl*, 139 Wn.2d 678, 683, 990 P.2d 396

(1999). Instead, a sexual offender facing revocation of a suspended sentence is afforded the same minimal due process rights as those afforded an offender facing revocation of probation or parole. *Id*. The following minimal rights have been identified by the United States Supreme Court to ensure that the finding of a violation will be based upon verified facts for parole violations:

> (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.

Id. (citing *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)).

The State correctly noted in responding to hearsay objections during the hearing that except as provided by ER 1101, the rules of evidence need not be applied in a hearing on a request to revoke probation. But a sexual offender facing revocation has a "minimal due process right to confront and cross-examine witnesses [that] is not absolute" and that is not answered by invoking ER 1101(c)(3). *Dahl*, 139 Wn.2d at 686; *see* RCW 13.40.140 (providing that juveniles have a right to confrontation in all adjudicatory proceedings unless expressly withheld by statute). For confrontation purposes, hearsay evidence is admissible only if the trial court reasonably finds that the defendant's right to confront and cross-examine witnesses is outweighed by good cause

to deny those rights. *State v. Abd-Rahmaan*, 154 Wn.2d 280, 290-91, 111 P.3d 1157 (2005). Good cause exists where there would be difficulty and expense in procuring the witnesses and the hearsay evidence is demonstrably reliable or clearly reliable. *Dahl*, 139 Wn.2d at 687. When admitting hearsay under this standard, trial courts "are required to articulate the basis on which they are admitting the hearsay testimony by either oral or written findings in order to facilitate appellate review." *Abd-Rahmaan*, 154 Wn.2d at 291. In offering hearsay through Ms. Hannon, the State did not show that there would have been any difficulty or expense in obtaining testimony from the original declarants and, in ruling on the hearsay objections, the trial court did not speak to issues of difficulty or expense in procuring live testimony. Whether a defendant's confrontation rights have been violated during a revocation hearing is a question of law we review de novo. *See State v. Mason*, 160 Wn.2d 910, 922, 162 P.3d 396 (2007), *cert. denied*, 553 U.S. 1035 (2008).

A threshold issue in this case, however, is the apparent mootness of the appeal. Ms. Dimisillo was committed to a JRA facility for just over 33 weeks as of October 1, 2010, putting her release date at approximately May 23, 2011. Her motion in the trial court to stay execution of the sentence pending this appeal was denied. This appeal was scheduled for decision without oral argument in September 2011. Appeals challenging the imposition of a suspended sentence following a revocation hearing are moot where

the appellant has served the suspended sentence by the time the appeal was heard. *State v. Linssen*, 131 Wn. App. 292, 295, 126 P.3d 1287, *review denied*, 158 Wn.2d 1014 (2006); *Abd-Rahmaan*, 154 Wn.2d at 290-91. This court may raise the issue of mootness sua sponte. *See In re Det. of C.W.*, 105 Wn. App. 718, 723, 20 P.3d 1052 (2001), *aff'd*, 147 Wn.2d 259, 53 P.3d 979 (2002).

We see no "matter[] of continuing and substantial public interest" that warrants deciding the appeal despite its having become moot. *See Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). The due process issue raised by Ms. Dimisillo has been addressed in previous decisions, albeit in the context of the SSOSA.

Accordingly, we dismiss the appeal as moot.[3]

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Siddoway, J.

WE CONCUR:

[3] Were the case not moot, two alternative bases would support denying the appeal. First, confrontation, as an issue distinct from hearsay, was not sufficiently raised below. *See* RAP 2.5(a). Although Ms. Dimisillo raised many hearsay objections, she hinted at her right to confrontation only once. RP at 12-13. We may decline to address an argument under RAP 2.5(a) sua sponte. RAP 12.1(b); *State v. Kirkpatrick*, 160 Wn.2d 873, 880 n.10, 161 P.3d 990 (2007). Second, there is no indication that any hearsay improperly admitted was relied upon for the court's decision.

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Korsmo, A.C.J.

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Brown, J.