

NO. 71312-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KENNETH WHITEMAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE MICHAEL C. HAYDEN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Has Whiteman failed to preserve his claim that he received inadequate advance notice that specific evidence would be presented at his Special Sexual Offender Sentencing Alternative revocation hearing, because he did not raise that objection at the hearing, instead he responded to the allegation and admitted it?

2. Did the trial court err when it considered facts admitted by Whiteman in making its determination as to the appropriate sanctions for the admitted violations of the conditions of sentence? If so, was that error invited by the defendant's own admission to the court?

3. Was any error in consideration of evidence of viewing pornography on one of Whiteman's computers harmless error, given the other admitted violations of treatment conditions, including using a father-daughter incest pornography site and using multiple unmonitored computers, and the overwhelming evidence that Whiteman could not be adequately monitored by the treatment provider?

B. STATEMENT OF THE CASE

On March 17, 2009, defendant Kenneth Whiteman entered a plea of guilty to charges of child molestation in the first degree (count 1), child molestation in the second degree (count 2), and incest in the first degree (count 3). CP 6-20. All three counts related to Whiteman's sexual abuse of his daughter KW¹ between June 1995 and November 2007. CP 20-22. Count 1 included his sexual contact with her when she was age 4 to age 11; Count 2 included his sexual contact with her when she was ages 12 and 13; Count 3 included his sexual contact with her at ages 15 and 16. CP 21-22. KW had reported the abuse in 2001 but the investigation was closed without charges being filed and the abuse continued. CP 20, 24-25. CS, KW's older sister and Whiteman's stepdaughter, also had reported that Whiteman sexually abused her; in 2012, Whiteman admitted that sexual abuse in the course of his sex offender treatment. CP 20, 24-25, 52.

On April 3, 2009, Judge Michael Hayden imposed a Special Sexual Offender Sentencing Alternative (SSOSA) pursuant to RCW 9.94A.670, over the State's objection. CP 34-43, 135-40. The court imposed standard range sentences of 130 months of

¹ Initials are used in place of the names of the charged and uncharged victims, in an attempt to protect their privacy.

confinement for the child molestation in the first degree, 75 months for the child molestation in the second degree, and 54 months for the incest in the first degree, all to run concurrently. CP 37. It suspended all but 12 months of confinement in work release on multiple conditions. CP 37-38, 42. Those conditions included that Whiteman be on community custody, comply with all rules of the Department of Corrections (DOC), undergo sex offender treatment for five years, “enter, make reasonable progress in, and successfully complete a specialized program for sex offender treatment” and “abide by all conditions of treatment.” CP 38.

Community Corrections Officer (CCO) Margaret Alquist prepared a Notice of Violation report in September 2013. CP 49-83. It specified four violations: (1) failing to comply with treatment by viewing pornography on 8/2/13;² (2) failing to comply with treatment by using his wife's computer that did not have Covenant Eyes on a daily basis; (3) failing to comply with treatment by using his computer without Covenant Eyes between August 2012 and on or about May 2013; (4) failing to comply with treatment by going in [CS]'s jobsite on or about 8/15/13. CP 50.

² The date in the list of violations is 9/2/13, but the content of the report, the timing of Whiteman's report of this specific violation, and the treatment provider's report all make clear the date of this violation is 8/2/13. CP 50-51, 58, 68.

Covenant Eyes is a computer software program that monitors and filters internet usage, sending a report of usage to a designated person. CP 69; <http://www.covenanteyes.com/> (visited 8/12/14). Whiteman was subject to a treatment rule that any use of the internet must be on a computer with Covenant Eyes or other software monitoring and filtering his internet usage. CP 69.

A polygraph was conducted on August 28, 2013, and the results were included in CCO Alquist's report. CP 53, 56-65. During a preliminary interview, Whiteman told the polygrapher that on August 9, 2013, Whiteman's wife caught him masturbating to a fantasy father-daughter website featuring a female who looked 17-18 years old. CP 58. Whiteman said he had been checking his wife's bingo points on Facebook when a pop-up appeared for that pornographic website and he clicked on it. CP 58. Whiteman denied any unreported viewing of pornography via the internet. CP 60. He told the polygraphist that he had lied to his therapist "on his 'turn-in sheets.'" CP 64.

After advice of his constitutional rights, Whiteman admitted to the CCO that he had gone to a "daughter-father porn site, and masturbated to the deviant behavior." CP 53. He agreed to

release of his wife's computer to DOC and admitted using his wife's computer 12 to 14 times without treatment permission. CP 53.

Alquist arrested Whiteman for the violations listed and, on the drive to jail, Whiteman admitted that he had been using his wife's computer daily, against treatment rules. CP 53. He claimed that he used it to check her Facebook posts. CP 53. He claimed he deleted only the word "incest" when his wife walked in on him. CP 53-54. He said he had been on two adult pornography websites. CP 54. Use of any pornography was prohibited by his treatment rules. CP 79.

The CCO recommended the court schedule a noncompliance hearing. CP 55. The CCO stated "Revocation may be considered due to the extensive period of time that Mr. Whiteman has been in treatment and his inability to use the tools to intervene in the deviant behavior cycle that re-enacts his actual crime." CP 55.

The treatment provider, Rodney Jong of Bellevue Community Services, provided a written report in September 2013. CP 68-69. The report and notes of Jong were attached to the violation report. CP 66-69. On August 3, 2013, Jong was informed by Whiteman's wife that the previous morning she had come home

unexpectedly and interrupted Whiteman masturbating to a video that appeared to be a daughter performing oral sex on her father. CP 68. Whiteman immediately shut down the video and erased the browser history, so his wife could not see what he had been browsing on the internet. CP 68.

When Jong called Whiteman the afternoon of August 3, Jong asked why Whiteman had not reported the violation himself on August 2. CP 68. Whiteman said he intended to write it on his weekly intervention sheet for the following Thursday. CP 68. The counselor concluded that Whiteman either thought the violation was trivial or was avoiding taking responsibility for it, and either choice was unsatisfactory. CP 68-69. Whiteman told his CCO that he did not think the "actor daughter" was a minor because she had a tattoo. CP 51.

Jong, Whiteman's counselor, was concerned that even if the female in the video was not a minor, "the theme of the pornography was a re-enactment of his multiple sexual offenses against both of his stepdaughters and his daughter," and the masturbatory behavior reinforces Whiteman's "deviant arousal pattern" and increases his risk of reoffending. CP 69. Jong concluded that Whiteman used his wife's unfiltered computer, in violation of

treatment rules, to bypass his counselor's monitoring of his internet usage. CP 69. Jong opined that because of Whiteman's failure to comply with conditions of his sentence, DOC supervision rules, treatment rules, and personal boundaries, Whiteman was at medium risk to reoffend. CP 69.

Whiteman submitted a pre-hearing memorandum. CP 84-88. In it, he admitted the first alleged violation, viewing pornography on his wife's computer; he stated the pornography was a fantasy directly related to incest. CP 85-86. He denied the actors were minors and denied using his wife's account to view soft pornography on Netflix. CP 85. He admitted the second alleged violation, using his wife's computer while it was not protected with Covenant Eyes. CP 86. He stated he used it primarily to check his wife's standing on her Facebook Bingo game. CP 86.

In that memorandum, Whiteman also admitted that his own computer did not have Covenant Eyes installed between April 2012 and May 2013. CP 86. He asserted that he did not have internet access at home or work during that time, although he did not claim that he had not used that computer to obtain access to the internet at other public or private locations where internet access is available. CP 86. When he moved back in with his wife in May

2013 he admitted that he did have internet access, but says that he mentioned that to his counselor and when told to install the program, he did. CP 86. He asserted that he believed he was in substantial compliance as to that computer. CP 86. Whiteman denied going to the drive-through where CS worked. CP 86.

Based on the two violations of treatment conditions that he admitted, Whiteman proposed that he should be sanctioned with up to 120 days of confinement. CP 87. He explained that he planned to open a computer repair store. CP 88. His counselor had imposed a condition that there would be another person at the store at all times to monitor his use of any computer; Whiteman said he had a person lined up to "work with him in that capacity." CP 88.

At a review hearing on September 4, 2013, Whiteman admitted alleged violations 1 and 2. RP 7.³ Then the parties began to discuss the appropriate sanction. RP 9-16. The two family members present, Whiteman's wife and uncharged victim CS, supported revocation of the suspended sentence, stating they believed the treatment was unsuccessful. RP 17-21.

³ There is one transcript volume, 9/4/13, which will be referred to as RP.

CCO Alquist expressed serious concern about Whiteman's lack of engagement in treatment and his concealment of his computer activity. RP 22-26.

When asked if he reported himself after his wife discovered him looking at incest pornography, Whiteman said that his wife called the counselor that morning, before Whiteman had a chance to call; Whiteman told the court that he had 24 hours to call in. RP 29. Whiteman said that the problem was that he had too much free time so "I went to one of those sites and viewed pornography on a fantasy site." RP 32. He said that he did not intend to do it again. RP 32.

In response, Whiteman's wife stated that over a week after the incident when she interrupted him masturbating, he had a new Surface computer, and was viewing pornography on it, just days before his polygraph. RP 32. Whiteman admitted to the court that he had viewed pornography on the Surface, but said that he had since stopped. RP 33.

The trial court found that Whiteman committed both violations that had been admitted. RP 38. It concluded that given the amount of time Whiteman had been in treatment, "he has been an abysmal failure at this treatment." RP 38. It revoked the

SSOSA, imposing the confinement time that had been suspended.
CP 92-93; RP 35-38.

Whiteman filed a motion for reconsideration. CP 95-118.
After considering the contents of that motion, the court denied it.
CP 119-20.

C. ARGUMENT

Whiteman claims that his constitutional right to due process was violated when, at his SSOSA violation hearing, the trial court considered a particular fact although Whiteman did not have prior notice that that specific fact would be considered. The fact at issue is that Whiteman had viewed pornography on a Surface computer in August 2013. Whiteman's constitutional claim should be rejected. Whiteman did not properly preserve this claim by objecting at the hearing. The trial court properly relied on behavior admitted by Whiteman in revoking the SSOSA. Any deficiency in the notice was harmless beyond a reasonable doubt, where Whiteman admitted the fact at the hearing, and admitted other facts of a similar nature.

A court may revoke an offender's SSOSA at any time and impose the suspended sentence if it is reasonably satisfied the

offender violated a condition of the suspended sentence or failed to make reasonable progress in treatment. State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999); RCW 9.94A.670(10), (11).

A defendant has minimal due process rights relating to a SSOSA revocation hearing. State .v McCormick, 166 Wn. 2d 689, 700, 213 P.3d 32 (2009). The Supreme Court has held:

minimal due process 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 statement by the court as to the evidence relied upon and the reasons for the revocation.

State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999) (citing Morrissey v. Brewer, 408 U.S. 471, 472, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)); U.S. Const. amend. XIV.

The Court explained that the notice required is “that the State inform the offender of the specific violations alleged and the facts that the State will rely on to prove those violations.” Dahl, 139 Wn.2d at 685. The due process requirements “exist to ensure that the finding of a violation of a term of a suspended sentence will be based upon verified facts.” Id. at 683 (citing Morrissey, 408 U.S. at 484).

Whiteman cites the due process clause of the Washington Constitution⁴ along with the federal due process clause, but has not argued that the Washington Constitution provides any greater right than the Fourteenth Amendment in the context of the issues in this case. The Supreme Court has held that Washington's due process clause does not afford broader protection. McCormick, 166 Wn.2d at 36.

1. WHITEMAN DID NOT PRESERVE HIS DUE PROCESS CLAIM.

Whiteman has not preserved his claim that he did not receive adequate advance notice of the evidence that he viewed pornography on the Surface computer, because he did not raise that objection at the hearing. Instead, he asked permission to respond to the allegation and admitted at the hearing that he viewed pornography on that computer. RP 33.

The failure to raise an objection to evidence considered at a SSOSA violation hearing is a waiver of any due process claim related to consideration of that evidence. State v. Dahl, 139 Wn.2d 678, 687 n. 2, 990 P.2d 396 (1999) (citing State v. Nelson, 103 Wn.2d 760, 766, 697 P.2d 579 (1985)). Whiteman does not argue

⁴ WA Const. art. I, §3.

that he made any objection at any time during the hearing. A defendant may not “sit by while his due process rights were violated at a hearing and then allege due process violations on appeal.” State v. Robinson, 120 Wn. App. 294, 299, 85 P.3d 376 (2004) (due process notice violation alleged). This claim of error has been waived.

Whiteman’s argument that his motion for reconsideration preserved the error is without merit. He asserts that the claimed due process violation could have been remedied at that point, so the objection was timely. However, the Supreme Court in Nelson held that “a motion after the court’s ruling” objecting to the consideration of hearsay evidence in a revocation proceeding was not a timely objection and was not sufficient to preserve a due process claim. Nelson, 103 Wn.2d at 766. The motion for reconsideration in this case, filed 10 days after the ruling, was not sufficient to preserve any error.

While the timing of the post-ruling motion in Nelson is unclear, in this case the ruling was final before the motion for reconsideration was filed, so the claimed due process violation could not have been remedied when the motion was filed – the objection necessarily was untimely. The motion for reconsideration

was filed 10 days after the order revoking the SSOSA, which was a final order. Final orders may be modified only “in those limited circumstances where the interests of justice most urgently require.” State v. Shove, 113 Wn.2d 83, 88, 776 P.2d 132 (1989); State v. Harkness, 145 Wn. App. 678, 685-86, 186 P.3d 1182 (2008). The court had no authority to modify its decision except as provided by CrR 7.8(b). See Shove, 113 Wn.2d at 88 (citing CrR 7.8(b) as the rule under which relief would be sought).

Whiteman did not assert a basis to vacate the order under CrR 7.8(b) in the motion for reconsideration. CP 95-99. Further, none of the types of errors specifically listed in CrR 7.8 were alleged in the motion for reconsideration. See CrR 7.8(b)(1-4) (categories of errors listed include: mistake, newly discovered evidence, fraud, a void order). The final type of error warranting relief recognized in CrR 7.8(b) is: “Any other reason justifying relief from the operation of the judgment.” CrR 7.8(b)(5). That subsection does not authorize relief on grounds that were available at the time of the hearing at issue. State v. Smith, 159 Wn. App. 694, 700, 247 P.3d 775 (2011); State v. Zavala-Reynoso, 127 Wn. App. 119, 123, 110 P.3d 827 (2005).

Case law establishes that a timely objection is one made during the revocation hearing. Even if a motion after the ruling is made could be timely, here there was no legal basis to vacate the final order that already had been entered, and the court had not authority at that time to revisit its decision. Under either theory, there was no timely objection, so the claimed error was waived.

2. THE COURT DID NOT ERR IN CONSIDERING FACTS ADMITTED BY WHITEMAN; IF IT DID ERR, THAT ERROR WAS INVITED.

Whiteman claims that he had a constitutional right to advance notice that his CCO would inform the court that she believed that Whiteman had been viewing pornography on his own Surface computer, after he was caught viewing pornography on his wife's computer. But Whiteman had been provided notice that, beyond the incest pornography, he had admitted that he visited two other adult pornography sites. CP 54. It is not clear if he was referring to his Surface computer when he made that admission. However, Whiteman has not established that the mention of the Surface computer was significantly different than that admission. He did not have a constitutional right to notice of every detail that

the court would consider. Further, his own admissions to viewing that pornography invited any error.

The State did provide notice of the violations alleged and the evidence that would be used to support those violations. There are two distinct components to a revocation hearing: a factual determination of whether the alleged violations occurred and a discretionary decision as to whether revocation is warranted. Dahl, 139 Wn. 2d at 684. Once the violations were admitted, there was a legal basis to impose sanctions, including revocation. RCW 9.94A.670(11). In determining the proper sanction, a court may consider facts raised by the victim or victim's representative. See RCW 7.69.030(14) (victim's right to present a statement). The defendant has a right to respond to any allegation made, as Whiteman did. At that point, the court was free to consider information that it considered reliable and relevant – the defendant's admission that he watched additional pornography on a computer that he purchased certainly was relevant to the appropriate sanction. Once a court has found violations, the court should be as informed as possible before imposing its sanction.

Before Alquist and Whiteman's wife referred to the Surface computer, Whiteman already had admitted to two violations of

treatment conditions and the parties were addressing the appropriate sanction. CP 85-86; RP7 (admitting violations); RP 9-16 (discussion of appropriate sanction). Whiteman's wife and one of his uncharged victims of sexual abuse already had stated that they believed that revocation was appropriate. RP 17-21. After Alquist and Whiteman's wife referred to the Surface computer, Whiteman admitted that it was his computer and that he had viewed pornography on it. RP 22-26, 32-33.

Whiteman's primary focus in his motion for reconsideration was that he was surprised when his wife advocated revocation at the violation hearing. CP 95-98. He also refers to that surprise on appeal, suggesting that it is further evidence that he lacked constitutionally required notice. This circumstance illustrates the opposite point, however, since his wife's opinion, and the opinions of Whiteman's direct victims, were not within the State's knowledge, and they were free to change their opinion even on the day of the hearing. Whiteman does not allege on appeal that his wife and daughter's statements in support of revocation were the product of constitutionally insufficient notice.

Further, any error in considering the evidence related to the Surface computer was invited by Whiteman. A defendant who

invites error may not claim on appeal that he is entitled to reversal based on that error. State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999). The invited error doctrine bars relief regardless of whether the defendant intentionally or inadvertently encouraged the error. Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). When Whiteman admitted that he viewed pornography on the Surface computer, he invited any error in the court's consideration of that information; he cannot complain of that error on appeal.

3. ANY ERROR WAS HARMLESS.

If it was error not to provide notice of the CCO's knowledge of Whiteman's viewing of pornography on the Surface computer, it was harmless, where Whiteman admitted those facts at the revocation hearing. The court revoked the SSOSA because it concluded that Whiteman's treatment had been an "abysmal failure." RP 38. The evidence relied on was the defense admissions of violations and the defendant's statements at sentencing. There is no indication the court relied on any more than Whiteman admitted in connection with the Surface computer.

Violations of a defendant's due process rights at a SSOSA revocation is subject to harmless error analysis. Dahl, 139 Wn.2d

at 688. The revocation is invalid if it was based on evidence improperly considered. Id.

The evidence that Whiteman was a failure in treatment was overwhelming, even without consideration of the use of his own computer to view pornography. Whiteman admitted going to a father-daughter incest pornography website, viewing pornography, and masturbating to it. CP 85-86; RP 7, 29-33. He had little choice but to admit visiting the incest website, as his wife caught him in the act. CP 58. He also admitted using his wife's computer daily, although it did not have the monitoring software required by his treatment rules. CP 53; 85-86.

Whiteman also did not report to his counselor that he had masturbated to incest pornography, as the treatment regimen dictated. CP 68-69. The day after the masturbation incident, when his counselor confronted him about the failure to report it, Whiteman told his counselor that he did not intend to report it immediately, but intended to disclose it in a weekly report. CP 68. But at the hearing, he told the court that his wife called the counselor that morning, before Whiteman had a chance to call; Whiteman told the court that he had 24 hours to call in. RP 29.

Jong, the treatment provider, found the original explanation for not disclosing the incest pornography incident unsatisfactory. CP 68-69. Jong concluded that Whiteman used his wife's computer to avoid monitoring of his use. CP 69.

In 2011 the court had modified the no contact order entered at sentencing, allowing contact with the charged victim at her request, if approved by the treatment provider. CP 38, 143. As of August 2013, even before he was arrested for these violations, Jong still had not given approval for that contact to occur. CP 69.

Jong was concerned that even if the female in the incest pornography video was not a minor, "the theme of the pornography was a re-enactment of his multiple sexual offenses against both of his stepdaughters and his daughter," and the masturbatory behavior reinforces Whiteman's "deviant arousal pattern" and increases his risk of reoffending. CP 69. Jong opined that Whiteman was a medium risk to reoffend. CP 69.

On appeal, Whiteman asserts that the court must have relied on the Surface computer pornography in revoking, because the court said that, in its judgment, Whiteman still was minimizing "the amount of contact that's happened – the depth of your problem." RP 34-35. Whiteman admitted viewing that pornography at the

hearing, however, so that would not constitute minimization. Whiteman's minimization included his assertion that when he was caught masturbating to father-daughter pornography, it was an accident, because a pop-up for the site appeared while he was checking his wife's bingo scores on her unmonitored computer. CP 52. Whiteman's wife asserted that as soon as she unexpectedly appeared, he deleted the site and his browsing history. CP 52, 68. Whiteman minimized again, telling his CCO that he only deleted the single word "incest" from the computer. CP 52.

Whiteman's minimization included his statement at the hearing that he looked at the incest pornography site because he had too much free time, but that he only went there on the one occasion when he was caught. RP 32. He admitted to the CCO that he also had used two adult pornography sites, which was prohibited by his treatment rules. CP 54, 79.

The minimization included Whiteman's claim that it was not a violation to have his own computer without the required monitoring software for nine months, because he did not have internet access at home or at work. CP 86. After he got internet access at home, he told his counselor, then he got the monitoring software when told

to do so. CP 86. He asserted that was substantial compliance with the requirement to maintain monitoring software. CP 86.

There is no confusion in this case as to the factual basis for the violations found by the court, because they were admitted. While the factual basis for violations are required to be included in its findings, the lack of specific written findings is not fatal where, as here, the trial court states on the record the evidence it relies upon and states its reasons for revocation. Nelson, 103 Wn.2d at 767. That standard is satisfied by the court's findings in this case.

The court's oral findings make clear that a significant reason for the revocation was that he did not believe that the treatment provider could monitor Whiteman's computer use. RP 35-37. Whiteman was a computer expert. CP 88; RP 69. Aside from the Surface computer, he admitted using his wife's computer unmonitored, and using his own computer unmonitored. The treatment provider concluded that Whiteman had used his wife's computer to avoid the monitoring software and that he would be able to break through any filtering safeguards. CP 69. Whiteman intended to open a computer repair business and the treatment provider was willing to give permission, but only if someone was present to watch his computer usage at all times. CP 69. The

treatment provider thus made it clear that it could not rely on Whiteman to comply with the terms of his treatment.

Any error in the claimed lack of notice was harmless did not contribute to the court's finding.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm the trial court's order revoking Whiteman's Special Sexual Offender Sentencing Alternative sentence.

DATED this 15th day of August, 2014.

Respectfully submitted,

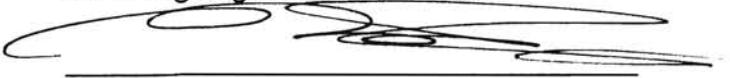
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Casey Grannis, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief Of Respondent, in STATE V. KENNETH WHITEMAN, Cause No. 71312-4-1, in the Court of Appeals, Division I, for the State of Washington.

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



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