

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CURTIS MULDROW,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Kitty-Ann Van Doorninck, Judge
(revocation hearing)

APPELLANT'S OPENING BRIEF

KATHRYN RUSSELL SELK
WSBA No. 23879
Counsel for Appellant

RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

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A. ASSIGNMENTS OF ERROR

1. Appellant Curtis Muldrow's minimum due process rights were violated at the Special Sexual Offender Sentencing Alternative (SSOSA) revocation hearing because Muldrow was deprived of his rights to confront and cross-examine the witnesses against him without a finding of "good cause" for those deprivations and the improper evidence was the basis for the court's decision to revoke the SSOSA.

2. Muldrow's due process rights were violated when the revocation court relied on improper, unreliable hearsay evidence in ordering the revocation.

3. The court erred in failing to suppress evidence which was the fruits of an unlawful search and in relying on that evidence in finding that Muldrow had committed a violation of the conditions of his SSOSA.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Defendants serving a Special Sexual Offender Sentencing Alternative (SSOSA) are entitled to minimum due process protections before that sentence is revoked. One of those protections is the right to confront and cross-examine witnesses, which must be honored unless the revocation court makes a specific finding of "good cause" for its deprivation. "Good cause" can only be found if there is evidence that there would be difficulty and expense in calling the witnesses and that the evidence offered in lieu of the witnesses is clearly reliable.

In 2003, Curtis Muldrow was ordered to serve a SSOSA. In 2008, the prosecution asked the court to revoke the sentencing alternative based upon allegations that he had violated the conditions of the SSOSA by

1) leaving the county without authorization of his community corrections officer (CCO), 2) having a relationship with a woman outside the county who had a child, 3) having contact with his girlfriend's child and her sister's children, 4) babysitting his girlfriend's child one day and 5) having several innocuous but not previously authorized pictures of children on his cellular telephone.

At the revocation hearing, the only witness for the prosecution was a CCO who had no firsthand knowledge of any of the facts relating to allegations 1-4 but only knew what the alleged girlfriend said had occurred and what the other county's detective said others had told him had occurred. There was no finding by the revocation court that there was "good cause" for the absence of any of the people who made statements to the CCO or who made statements to the other detective, who then relayed them to the CCO. There was also no finding that the substitute hearsay evidence of testimony by the CCO and documents produced based upon what others had said was "clearly reliable."

Were Mr. Muldrow's minimal due process rights violated by this deprivation of his right to confront and cross-examine the witnesses against him at the revocation hearing?

2. Due process requires that a court's decision to revoke a SSOSA must be based upon verified facts and accurate knowledge, not improperly admitted hearsay. Were Muldrow's minimal due process rights further violated when the revocation court relied on improper, unreliable evidence in revoking his SSOSA?

3. Muldrow was accused of committing a violation of the

terms of his SSOSA by having innocuous but unauthorized pictures of a few children on his cellular telephone. Those photos were found by the CCO when she searched the cell phone after taking Muldrow's backpack to her office when the jail staff refused to take it as they booked him into custody.

Warrantless searches are per se unreasonable and there are only a few recognized, carefully circumscribed exceptions.

a. Under one of those exceptions, an officer may conduct an "inventory" search of a person's effects when that search is made for the justifiable purpose of finding, listing and securing those items from loss when a person is taken into custody. The scope of the search must be limited to those purposes, however, and the search must not be a general, exploratory search done for the purposes of seeking evidence of a crime.

Muldrow's CCO admitted that she only needed to log in the existence of the cell phone and did not need to turn it on and search through the 50+ pictures contained on it in order to do an "inventory" of Muldrow's property. She also admitted that the reason she conducted the search of the phone was because she thought unauthorized photos are often found on the cell phones of sex offenders who were believed to have committed other violations.

Was this search unlawful and did the court err in failing to suppress the illegally gathered evidence because it was not the fruits of a valid "inventory" search?

b. Under Article 1, §7, persons such as Muldrow still

retain a limited right to privacy. As a result, while they may be subjected to warrantless searches by a CCO, such a search of their effects must be reasonable and is required to be supported by a well-founded suspicion that the offender has committed a violation of the terms of the SSOSA.

Were Muldrow's rights to privacy under Article 1, § 7, violated by the CCO's search of his phone when that search was not based upon any suspicion specific to Muldrow but rather on the generalized suspicion that sex offenders who commit other violations often have improper pictures on their phones?

Further, did the revocation court err in refusing to suppress the unlawfully seized evidence and in relying on that evidence in finding Muldrow guilty of committing one of the alleged violations of the terms of his SSOSA?

4. Is reversal of the SSOSA revocation required because the decision to revoke was made after a hearing in which Muldrow's due process rights were violated, the decision itself was a violation of due process and the court's decision rested not only on unreliable hearsay evidence but also on evidence which was the fruits of an unconstitutional search?

C. STATEMENT OF THE CASE

1. Procedural facts

Appellant Curtis Muldrow was a juvenile when he was charged with two counts of first-degree child rape. CP 1-3; RCW 9A.44.073. On April 3, 2003, before the Honorable Kathryn J. Nelson, Muldrow entered

guilty pleas to the charges. 1RP 1-9;¹ CP 7-16. On May 8, 2003, Judge Nelson ordered Muldrow to serve 6 months in custody, followed by 125 months to be served under a Special Sex Offender Sentencing Alternative (SSOSA). 2RP 11-18; CP 22-32.

Hearings were held before Judge Nelson on November 14, 2003, May 7, November 5 and 10, 2004, April 8 and October 14, 2005, September 1, 2006, May 25, November 2 and 15, 2007, before Judge Ronald Culpepper on February 15, 2008, before Judge Susan K. Serko on June 18, 2008, and before Judge Kitty-Ann Van Doorninck on July 9 and 18, September 5 and 19, and October 10, 2008, after which Judge Van Doorninck revoked the SSOSA and ordered Muldrow to serve 131 months in custody. 3RP 1, 4RP 1, 5RP 1, 6RP 1, 7RP 1, 8RP 1, 9RP 1, 10RP 1, 11RP 1, 12RP 1, 13RP 1, 14RP 1, 15RP 1, 16RP 1, 17RP 1, 18RP 1, 19RP 1-45.

¹The verbatim report of proceedings consists of 19 volumes, which will be referred to as follows:

April 8, 2003, as "1RP;"
May 8, 2003, as "2RP;"
November 14, 2003, as "3RP;"
May 7, 2004, as "4RP;"
November 5, 2004, as "5RP;"
November 10, 2004, as "6RP;"
April 8, 2005, as "7RP;"
October 14, 2005, as "8RP;"
September 1, 2006, as "9RP;"
May 25, 2007, as "10RP;"
November 2, 2007, as "11RP;"
November 15, 2007, as "12RP;"
February 15, 2008, as "13RP;"
June 18, 2008, as "14RP;"
July 9, 2008, as "15RP;"
July 18, 2008, as "16RP;"
September 5, 2008, as "17RP;"
September 19, 2008, as "18RP;"
October 10, 2008, as "19RP."

Muldrow appealed and this pleading follows. See CP 170-73.

2. Overview of relevant facts

After juvenile Curtis Muldrow pled guilty to two counts of first-degree rape based upon contact with a neighborhood child, he was granted a SSOSA sentence in 2003. CP 1-3, 7-16, 22-32. One condition of that sentence was that Muldrow have “[n]o contact with persons under the age of 16,” except for his brother. CP 26. Another was that he was not to have a “position of authority or trust involving children under the age of 18.” CP 40. Muldrow was also supposed to inform his community corrections officer “of any romantic relationship to verify there are no victim-age children involved.” CP 40.

In October of 2003, a Petition was filed alleging that Muldrow had not complied with the conditions of his sentence by having a romantic relationship with someone younger than 18. CP 48-51. Muldrow had himself reported this alleged violation. CP 49. At the hearing on the Petition, the consensus was that the violation was not intentional or manipulative but that Muldrow needed to have his conditions clarified for him. 3RP 3-17. The court then entered an order modifying the sentence, ordering Muldrow to serve 36 days in custody with credit for 36 days of time served and adding a condition that he not initiate contact with those under 18 years of age without prior approval of his CCO and treatment provider, except Muldrow’s brother. CP 71-72, 130-31.

In May of 2004, at a review hearing, it was reported that Muldrow was doing fine and in compliance with his conditions. 4RP 3-4. Similar results and conclusions that Muldrow was not a high risk to reoffend were

reached in August and November of 2004, April and October of 2005, September of 2006 and May of 2007, and in May it was estimated that Muldrow would complete his treatment by the end of that summer. CP 63-124; 5RP 2-3, 6RP 2-3, 7RP 1-3, 8RP 1, 9RP 4-5, 10RP 3-4.

Then, in July of 2007, a Petition was filed alleging that Muldrow had violated his SSOSA conditions by failing to advise his CCO of a change of address, failing to register his address and having contact with a minor. CP 99-102. Despite these allegations and Muldrow's apparent failure to pay towards his legal financial obligations, Muldrow's treatment provider recommended that he stay in treatment because of his significant progress there overall. CP 96-98.

After hearings which were ultimately held before Judge Van Doorninck, the judge found that Muldrow had committed the alleged violations but that he should be retained in treatment, based in large part on the testimony of Muldrow's counselor who spoke very highly of him and was very impressed with Muldrow's progress and success over the previous several years. 11RP 3, 12RP 3-4, 13RP 3, 14RP 5, 15RP 4-18, 37, 47; 16RP 3-6.

At the review hearing on September 5, 2008, the treatment provider's report indicated that Muldrow was in compliance. 17RP 4. The community corrections officer told the court that Muldrow was clearly "trying," was in compliance for reporting and was trying to get a job. 17RP 4.

On September 19, 2008, however, the parties again appeared before Judge Van Doorninck and the prosecutor told the court that he had

received a fax from DOC the day before, alleging five new violations. 18RP 3. The hearing on those violations was held on October 10, 2008. 19RP 5. At that hearing, Pamela Bohon, a community corrections officer for DOC who was currently supervising Muldrow, described the alleged violations as follows: 1) having multiple unauthorized minor contacts in Olympia since September 5, 2008, 2) being in a position of trust or authority over a minor child since September 5, 2008, 3) having an unauthorized romantic relationship with a woman named Erin Staap, who it was believed had a minor child, 4) going out of the county without CCO permission for several days in September, 2008, and 5) having unauthorized possession of minor child pictures on a cell phone. 19RP 9-11.

Allegations 1-4 all stemmed from conversations Bohon had with others. 19RP 12-13. Bohon testified that, in September of 2008, she had received a telephone call from a police detective in Thurston County, someone she thought was named Darryl Leischner. 19RP 12. In that call, the detective told Bohon that Muldrow had been in Thurston County, that he had been staying with a new girlfriend there, that the girlfriend's name was Erin Staap, that Staap had a two-year old son, that Staap had a sister who stayed with her and that Staap's sister also had two children, ages four and five. 19RP 12-13. The detective also told Bohon dates that he thought Muldrow had been in Thurston County in September and that the officer thought Muldrow had met Staap on a "chat line" which Muldrow had mistakenly thought was a computer chat line. 19RP 13-14. The detective said he was going to pursue charges against Muldrow in

Thurston County for failing to register as a sex offender while there and that he was going to try to arrest Muldrow before he left to go back to Pierce County. 19RP 14.

The day after that initial call, the detective again telephoned Bohon, this time telling her that Staap had reported that Muldrow had taken a 1:00 bus from Thurston County to Pierce County. 19RP 14. When Muldrow came into a Pierce County office that afternoon to register as he was required to do each week, he was arrested. 19RP 15. He had a backpack with him which Bohon took back to her office, because the jail refused to take it into custody. 19RP 15-25. Back at her office, Bohon searched the backpack, turning on the cellular telephone she found inside and searching through all of the 50+ photographic images she found there. 19RP 18-20. A few of those images were of children. 19RP 19-28. None of the images was improper or pornographic but Muldrow was apparently not supposed to have images of children. 19RP 18-28. Allegation 5 was based on those photos. 19RP 3-28.

The phone was shown at the hearing and Bohon described each picture in detail. 19RP 27-28. Of 51 photos, five included kids; one was a picture of a boy and a girl, one was of a little boy laughing, one was of a woman holding a boy, one was of a 5 or 6 year old in a kitchen, and one was a close face shot of a child. 19RP 27-28. None was in any way improper or suggestive or sexual; all were completely innocuous. 19RP 25-29.

Bohon testified that, at some point, she herself spoke to Staap. 19RP 15-16. Bohon then related in court what she said Staap told her

about having “left” Muldrow, being upset, not knowing that Muldrow was a sex offender, having left her child with Muldrow for about five hours while she was at work when there was an emergency, and that Staap and her sister had lost their housing because Muldrow had stayed there. 19RP 15-16. Bohon also said that Staap claimed Muldrow had spent the night when her son and her sister’s sons were at the home. 19RP 16.

The Thurston County detective sent Bohon a report and documents he said were transcripts of taped statements that Staap and her sister had given to that officer. 19RP 32. Bohon said that the transcripts were “very similar to the conversation” Bohon had with Staap. 19RP 33. The transcripts and the report of the Thurston County detective were admitted over Muldrow’s objections that they were improper hearsay. 19RP 32-37.

Although Bohon said Staap agreed to be available to testify by phone if the court had any questions, Staap was not called on the phone, nor was she present to testify. 19RP 15; see 19RP 1-37. The Thurston County officer was also not present. 19RP 1-37. Instead, the only witness the state presented was Bohon. 19RP 1-37. Based on her testimony and the phone, the court found Muldrow guilty of the alleged violations of his SSOSA, revoked that sentence and ordered Muldrow to serve 131 months in prison. 19RP 42-43.

D. ARGUMENT

1. REVERSAL IS REQUIRED BECAUSE MR. MULDROW’S MINIMUM DUE PROCESS RIGHTS WERE VIOLATED AT THE REVOCATION HEARING

A criminal defendant who is given a sentencing alternative such as a SSOSA has a significant liberty interest in the expectations receiving

such a sentence creates, such as being in the community, spending time with family and friends, having a job and other freedoms inmates in custody do not enjoy. See In re the Personal Restraint of McKay, 127 Wn. App. 165, 169-70, 110 P.3d 856 (2005). As a result, when there is a proceeding at which the court is considering revoking a SSOSA, the defendant is entitled to due process protections. See State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999). While not entitled to the full panoply of rights applicable in a “criminal proceeding,” the defendant in a SSOSA revocation hearing is entitled to minimal due process rights, defined as:

(a) written notice of the claimed violations; (b) disclosure . . . of the evidence against him; (c) the opportunity to be heard; (d) the right to confront and cross-examine adverse 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.

Dahl, 139 Wn.2d at 684, citing, Morrissey v. Brewer, 408 U.S. 471, 489, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).

In this case, this Court should reverse the revocation of the SSOSA, because Mr. Muldrow’s minimum due process rights were violated at the revocation hearing when he was deprived of the right to confront and cross-examine adverse witnesses on allegations 1-4 without a finding of “good cause” for those deprivations. Further, his due process rights were again violated by the court’s decision to revoke the SSOSA, because that decision was based on the improperly admitted, unreliable hearsay evidence.

a. Violation of the rights to confront and cross-examine

First, this Court should reverse the revocation court's findings of guilt on allegations 1-4, because Muldrow's limited rights to confront and cross-examine the witnesses against him on those claims were violated at the revocation hearing.

i. Relevant facts

At the October, 2008 revocation hearing, counsel repeatedly objected to the prosecution's reliance on hearsay from Bohon regarding allegations 1-4. Before Bohon's testimony began, counsel told the court Muldrow was contesting all of the allegations and that he objected to the court accepting "hearsay testimony by the probation officer about these violations." 19RP 8. Counsel noted that the officer did not have any first-hand knowledge of violations 1-4, so that the officer's testimony would simply amount to relating hearsay. 19RP 8. Counsel made it clear that his objection was not only to Bohon's testimony but also the documents which were themselves full of hearsay. 19RP 8. He declared; "we would object to the Court accepting any hearsay testimony or considering any police reports or alleged statements that were supposed to have been taken from these individuals, since we would not have any ability to cross-examine any of these people." 19RP 8.

During the testimony, counsel also repeatedly objected, asking for and receiving a "standing objection" to all of the hearsay testimony and evidence. 19RP 12, 16, 32-34. He objected to the testimony of Bohon about what the Thurston County detective told her. 19RP 12-13. He

objected to the testimony from Bohon about her conversation with Ms. Staap. 19RP 15-16. Indeed, he objected so many times that the court admonished him that it was “clear” he had a “standing objection” to all hearsay. 19RP 16.

Counsel nevertheless later objected to the admission of documents Bohon said were transcripts of the Thurston County officer’s report and his interviews of the girlfriend and her sister. 19RP 32-34. He again stated that the documents were “hearsay upon hearsay,” noting that he had not been given the tape recordings and thus had not had the opportunity to listen to them himself. 19RP 34. He also said he had not had “any ability to, you know, challenge anything, based on the fact that nobody’s here to testify about these documents or about what’s in these documents, other than hearsay testimony from this witness.” 19RP 33-34. Put simply, he said, he was not able to cross-examine anyone on any of these items or testimony relating to allegations 1-4, which he said was improper. 19RP 34-35.

After Bohon’s testimony was complete, the prosecution argued that the court should find that Muldrow had committed the alleged violations, because of what Bohon and the documents the state had presented said had reportedly occurred. 19RP 36. Indeed, the prosecutor declared that the evidence against Muldrow on all five of the violations was “undisputed.” 19RP 37.

Counsel then objected, stating that the evidence was *not*, in fact, “uncontested” by Muldrow. 19RP 37. Counsel reminded the court that he had wanted to cross-examine the individuals making the allegations but

the state had not brought those people as witnesses. 19RP 37. Counsel stated again that no one who testified had observed the alleged behavior on allegations 1-4 and that the testimony of Bohon was mostly double and triple hearsay, because it was from statements others had made to the Thurston County officer or to Bohon herself 19RP 37. Counsel further objected that there had been no showing at all why none of the people who made the statements were not present for the hearing to provide the testimony directly and give Muldrow the opportunity to confront and cross-examine on their claims. 19RP 38.

In finding Muldrow guilty, the court first stated that it found Bohon credible as a witness and then said that, while it understood “the concern with multiple levels of hearsay,” Bohon “testified about who she talked to directly” and had “talked to Ms. Staap.” 19RP 39. The court said that hearsay was admissible “[i]n hearings like this.” 19RP 39. The court concluded that prosecution had proved all five violations “by a preponderance of the evidence that was presented before me today.” 19RP 40. The court later relied on the violations in revoking the SSOSA. 19RP 40-43.²

- ii. Muldrow’s limited due process rights to confrontation and cross-examination were violated for allegations 1-4

In relying on Bohon’s hearsay testimony and the documents to which Muldrow repeatedly objected, the revocation court violated Muldrow’s due process rights at that hearing.

²More detailed discussion of the specifics of that ruling is contained, *infra*.

While the Sixth Amendment right to confrontation does not apply to revocation proceedings, defendants in such proceedings are still vested with the rights to confrontation and cross-examination as part of their rights to due process. State v. Abd-Rahmaan, 154 Wn.2d 280, 287-88, 111 P.3d 1157 (2005). These “more flexible” rights exist and are guaranteed unless and until the revocation court makes an explicit finding that there is “good cause” for not allowing such confrontation. Dahl, 139 Wn.2d at 686. Put another way, while the rights to confrontation and cross-examination at revocation hearings are not “absolute,” “hearsay evidence should be considered only if there is good cause to for[e]go live testimony.” Dahl, 139 Wn.2d at 686. For “good cause” to exist, there must be evidence to support it and the revocation court must specifically find it, rather than simply assuming it to be so. See Dahl, 139 Wn.2d at 686.

Here, there was neither a finding nor any evidence to support a conclusion that there was “good cause” to deprive Mr. Muldrow of his due process rights to confront and cross-examine all of the witnesses making the claims against him. In this context, “good cause” is a two-part issue, requiring proof of both difficulty and expense in having the witnesses appear and clear reliability of the proposed substitute for their testimony. See Abd-Rahmaan, 154 Wn.2d at 290, quoting, State v. Nelson, 103 Wn.2d 760, 765, 697 P.2d 579 (1985). The test for finding “good cause” is a “balancing one,” weighing the defendant’s rights to confrontation and cross-examination against the reason for not allowing that confrontation. See Nelson, 103 Wn.2d at 765. Further, the court examining that balance

must also find that the alternative evidence proffered is clearly, demonstrably reliable. Abd-Rahmaan, 154 Wn.2d at 290; Dahl, 139 Wn.2d at 686-87.

Thus, in Dahl, the Court found that the defendant's due process rights to confrontation and cross-examination were violated when the state made no effort whatsoever to show that there was difficulty or expense in obtaining live testimony or that the evidence used in substitution of that testimony was clearly reliable. 139 Wn.2d at 687. The evidence admitted over defense objection was a treatment report in which it was claimed that Dahl had exposed himself to two girls. 139 Wn.2d at 683, 686-87. The girls had reported the incident to an officer and subsequently identified Dahl in a photo montage. 139 Wn.2d at 683-88.

In finding that the revocation court had properly relied on the claims of exposure contained in the police report, the Court of Appeals relied on its belief that there was other evidence corroborating the claims of the girls, such as their identification of him in the montage, Dahl's inability to account for his whereabouts at the relevant time, and the fact that the incident occurred near where Dahl worked. 139 Wn.2d at 686.

The Supreme Court disagreed and reversed. First, the Court noted that the only evidence before the revocation court on the alleged exposure was from the report of the incident in the treatment report. 139 Wn.2d at 686-87. No evidence was presented about the circumstances of the incident or the presentation of the photo montage. 139 Wn.2d at 686-87. As a result, the Court held, there was no evidence from which the revocation court could have based a determination of reliability of the

claims of the girls about the alleged event. 139 Wn.2d at 686-87. Because the state presented no evidence about how the identification was made, the conduct of the montage, the identifications of the girls, or any other investigation on the issue, there was insufficient evidence for the revocation court to find the claims of the girls were reliable; the fact that the claims were reported and an identification made was not enough. Id.

In addition, the Court noted, the state did not show any difficulty or expense would be suffered by having the girls appear as witnesses and did not call the officer who reported the incident to the CCO to provide information from which reliability might have been found. Id.

As a result, the Supreme Court concluded, there was no “good cause” to deny Dahl his due process rights to confrontation and cross-examination at the revocation hearing, and the hearing court’s reliance on the hearsay claims in the treatment report was improper. 139 Wn.2d at 687.

Here, as in Dahl, the state did not show any difficulty or expense would be suffered in calling the Thurston County detective, alleged girlfriend, her sister or others who made claims against Muldrow as witnesses. Yet the hearsay statements of all of those people were reported in the written documents submitted over Muldrow’s objection or in the testimony of Bohon, to which Muldrow also objected. And all of that hearsay was the basis for the court’s finding that Muldrow had committed alleged violations 1-4.

Further, the state did not make any effort to even argue “good cause” or establish that the statements made against Muldrow were

somehow “clearly, demonstrably reliable.” 19RP 1-37. They did not even *argue* that point, nor did they argue for a finding of “good cause.” 19RP 1-38.

Yet there was no evidence presented from which the reliability of the claims could be evaluated. Instead, those claims were simply relied on as truth, with no investigation of their merit or accuracy by Bohon or the court itself. Further, despite the court’s declaration that the “being out of the county” allegation was based on Bohon’s “own personal knowledge,” the only “personal” knowledge Bohon had about that was whether she had given permission for Muldrow to go outside the county, not whether Muldrow had in fact done so. Instead, the only evidence that Muldrow was actually out of the county was again hearsay - the Thurston County detective’s declaration and Staap’s statement to Bohon that it was so.

In short, there was nothing indicating the reliability of the claims about Muldrow regarding allegations 1-4. The claims were simply taken from the word of two women who said certain things had happened, without any information about whether the women had any bias against Muldrow or any reason to fabricate claims against him. The fact that Bohon, an officer, repeated those claims based on what she was told by Staap or what the Thurston County detective similarly heard does not make those claims “clearly reliable.”

Notably, the state did not even give counsel copies of the tapes from which the interviews were supposedly transcribed, to give him at least the opportunity to examine whether the alleged transcripts were even an accurate representation of the interviews, let alone allowing him to

confront or cross-examine them about such things as bias or motive. 19RP 34. Nor were those tapes presented in court. 19RP 1-37.

The revocation court erred and violated Muldrow's due process rights to confrontation and cross-examination of the witnesses against him by relying on the hearsay from Bohon and the written materials without making any finding that there was "good cause" to deprive Muldrow of those rights. And the state utterly failed to show such "good cause." This is so even though counsel had repeatedly maintained his client's rights to confront and cross-examine witnesses and had specifically asked why the witnesses were not present. See 19RP 7-8.

Based on these violations of Mr. Muldrow's due process rights at the revocation hearing, this Court should reverse. See Dahl, 139 Wn.2d at 686-87.

b. The court's reliance on improper evidence in ordering revocation was itself a due process violation

To be proper, the revocation court's decision must rest upon "verified facts and accurate knowledge." McKay, 127 Wn. App. at 170. Where the error is that the court denied the right to confrontation and cross-examination and hearsay evidence is improperly relied upon, the "harm" is that the revocation court "will rely on unverified evidence in revoking a suspended sentence," rather than an "accurate knowledge" of the defendant's behavior. Dahl, 139 Wn.2d at 688, quoting, Morrissey, 408 U.S. at 484. If a ground for revocation is based upon improper evidence, the revocation itself is invalid and it is a separate violation of due process if the revocation is based upon that improperly supported ground. See

Dahl, 139 Wn.2d at 688.

At the outset, the revocation court's decision here leaves a lot to be desired. To ensure that the appellate court has sufficient information for evaluating the revocation court's decision, the lower court is required by due process to "articulate the factual basis of the decision." Dahl, 139 Wn.2d at 689, citing, Nelson, 103 Wn.2d at 767. The failure to do so is improper. See State v. Lawrence, 28 Wn. App. 435, 439, 624 P.2d 201 (1981). As a result, the Supreme Court has declared that, "[a]lthough oral rulings are permitted, we strongly encourage judges to explain their reasoning in written findings" in order to make it clear to the appellate court the basis for the revocation. Dahl, 139 Wn.2d at 689. When a court fails to make such an explanation, the appellate court will nevertheless reverse the revocation if it appears that the revocation court placed weight on the improper evidence and it had an influence on the court's decision.

Id.

Here, the revocation court's decisions were far from a complete explanation of the factual basis for its decisions. First, after finding Bohon "credible as a witness" and referring to Bohon "having talked to Ms. Staap," the court declared it would make "specific findings" of guilt on each of the five allegations, then made the following cursory oral findings:

Violation No. 1, that the defendant had multiple unauthorized contacts with minors in Olympia since September 5, 2008.

That he was in - - Violation 2 - - a position of trust or authority over a minor child. And that was the babysitting incident that Ms. Staap told Ms. Bohon about.

Having an unauthorized romantic relationship with Ms. Staap, who has a minor child, which again Ms. Staap told

Ms. Bohon about.

And being out of the county without Ms. Bohon's permission, which is obviously something she has on her own personal knowledge.

And having unauthorized possession of pictures of minor children.

And I think there were one, two, three, four - - about four pictures of children, and there was no allegation that anything was inappropriate about the nature of the pictures, themselves[.]

...

So I'll find all five violations by a preponderance of the evidence that was presented before me today.

19RP 39-40.

A few moments later, in revoking the suspended sentence, the court declared that it was doing so based upon the "very significant violations" it had found. 19RP 42-43. Judge Van Doorninck was also very unhappy that it appeared Muldrow did not understand the rules with which he was expected to comply, noting that she had previously reminded him about not having contact with minor children and he had then gone "out of the county without permission, and you hook up with somebody who has children." 19RP 43. The judge said, "[t]hat constitutes a huge danger to the community, in my opinion." 19RP 43.

It appears from this language that the judge relied on all of the alleged violations in deciding to revoke. Not only did she specifically refer to allegations 3 and 4 by noting Muldrow had gone out of the county without permission and dated someone with a minor child, she also mentioned the other allegations by referring to having found "significant violations." Further, the court's concern about having warned Muldrow

about contact with children indicates that the court believed Muldrow *had* been in such contact, which was violation 1. And being in a relationship with someone who has a child is not a “danger” unless that means some degree of authority over that child, violation 2.

Thus, the court’s decision rested on all of the allegations against Muldrow. And the court’s findings on allegations 1-4 relied on Bohon’s hearsay testimony about what she was told by others, including Ms. Staap, rather than testimony by Ms. Staap, her sister or other witnesses themselves, in violation of Muldrow’s due process rights to confrontation and cross-examination.

As a result, because the court’s decision to revoke Mr. Muldrow’s SSOSA was based upon improperly admitted hearsay evidence, the revocation decision was based upon unverified and unreliable facts and was itself a violation of Muldrow’s due process rights. This Court should so hold and should reverse.

2. THE COURT ERRED IN FAILING TO SUPPRESS THE PHOTOGRAPHS ON THE PHONE BECAUSE THEY WERE THE FRUITS OF AN UNLAWFUL SEARCH; ALLEGATION 5 AND THE REVOCATION MUST BE REVERSED

In addition to violating Muldrow’s due process rights, the revocation court erred in refusing to suppress the photographs Bohon found on Muldrow’s cell phone, because those photos were the fruits of an unlawful search.

- a. Relevant facts

At the beginning of the revocation hearing, counsel asked for clarification of which allegations the prosecution was seeking to prove,

noting that the prosecution's Petition had not included the allegations regarding the pictures on the cellular phone. 19RP 5. He said he wanted additional time to brief a "search and seizure" issue regarding the photos if the court was going to consider that claim against Muldrow. 19RP 6-7. Without that time, he said, he could only make a "blanket argument" that the search of the phone was "bad" and a violation of Muldrow's rights under the state and federal constitution. 19RP 6-7.

The prosecutor objected that counsel had been shown the cell phone pictures at the previous hearing and it seemed that counsel should have been aware that those photos would be at issue at this hearing. 19RP 6-7.

At that point, the court suggested that the hearing should go forward on violations 1-4, with Bohon testifying on the 5th so the court would know the "factual circumstances" relating to the search. 19RP 9-7. The court said that, after that, counsel could ask for additional time if he felt it was necessary before addressing the issue. 19RP 7.

During her testimony, Bohon explained how she found the photos on the cell phone. 19RP 18. When Muldrow was being booked into jail, the jail told Bohon she had to take Muldrow's backpack with her, because the jail would not take it. 19RP 18. Bohon did so, taking the backpack back to her office where she then went through it and found, *inter alia*, the phone. 19RP 18.

Bohon said she had an "obligation" to search and list all of the items in someone's possession, put a copy of the list in her file and secure the property in the property room whenever she was involved in an arrest.

19RP 18-19. She said it was her “habit” to do so, and described what she did with Muldrow’s backpack as an “inventory.” 19RP 19.

Bohon admitted, however, that all she had to do to conduct an “inventory” of Muldrow’s possessions was to list them on her form and put them into property. 19RP 21-22. She conceded that the reason she had to do the inventory in the first place was to make sure that the office was not later accused of losing or taking something. 19RP 22. She also admitted that, for that purpose, all she had to do was write down that the backpack had contained a cell phone and then secure the cell phone in the property room. 19RP 22. She did not do so, however, instead turning on the phone and searching through it, examining the 50+ photos on the phone to see what they were. 19RP 19.

Bohon admitted that these actions were not necessary in order to “do the inventory.” 19RP 22. She then conceded that she had not searched the phone for the purposes of inventory but rather because she thought it was possible there might be unauthorized pictures on it. 19RP 22. According to Bohon, “frequently, we find a lot of our sex offenders, when they’re in violation, have unauthorized pictures either on DVDs or phones[.]” 19RP 22.

In arguing that the search was improper and the evidence of the photos should be suppressed, counsel pointed out that the search was not, in fact, a valid “inventory search,” because Bohon had not needed to turn on the phone and search through the photos in order to conduct an inventory. 19RP 23. He also argued that Bohon should have gotten a search warrant before searching the phone. 19RP 23. The prosecution

responded that Muldrow had only a limited expectation of privacy because he was on supervision. 19RP 23. According to the prosecutor, the search of Muldrow's phone was essentially the same as if a CCO had entered Muldrow's home and searched it without a warrant, something the prosecutor said was proper because Bohon had a "duty" to "make sure" Muldrow was committing violations of the conditions of his release. 19RP 23.

Without discussion, the court admitted the phone. 19RP 23.

Counsel later argued on the issue again, stating that the search was not a valid inventory search and that the CCO was not authorized to "look through the cell phone" without having "some kind of authority" to do so. 19RP 38. The court did not address this argument in its ruling. 19RP 39-40.

- b. The photos should have been suppressed and allegation 5 and the SSOSA revocation should be reversed

The revocation court erred in admitting the photos and in relying on them to find that Muldrow had committed the violation alleged in allegation 5, by having unauthorized although benign photographs of children.

As a threshold matter, the Washington exclusionary rule under Article 1, § 7, applies to prohibit exploitation by the state of illegally seized evidence in a revocation hearing. In State v. Lampman, 45 Wn. App. 228, 724 P.2d 1092 (1986), this Court examined prior caselaw in which Washington courts had held that the exclusionary rule did not apply to parole or probation revocation proceedings, noting that those holdings

were all based upon the federal exclusionary rule under the Fourth Amendment. 45 Wn. App. at 231-32. This Court then pointed out that, since those cases were decided, the state Supreme Court had recognized that Article 1, § 7 provides greater protections and a different focus than the Fourth Amendment. *Id.* The Fourth Amendment exclusionary rule is intended to “deter unlawful police action,” this Court pointed out, while the Article 1, § 7 exclusionary rule was focused on providing individuals with “a remedy for a violation of an individual’s right to privacy.” 45 Wn. App. at 232. As a result, this Court concluded, “[i]f a probationer’s right to privacy is violated, the exclusionary rule should be invoked regardless of the particular proceeding involved.” 45 Wn. App. at 232.

In this state, the rights of a defendant serving a SSOSA have been deemed to be akin to the rights of a person on probation or parole. *See, e.g., Abd-Rahmaan*, 154 Wn.2d at 287-88; *Dahl*, 139 Wn.2d at 686 (adopting the standards for parole and probation revocation to SSOSA revocation hearings as a result). This makes sense because, in both situations, the defendant is in the community but subject to close scrutiny and supervision by the state, with the threat of losing his conditional liberty if he does not comply with the conditions under which that liberty was granted. Although there does not appear to be any case directly holding that the state exclusionary rule applies to SSOSA revocation proceedings, the identity of interests between persons serving a sentencing alternative and those on parole or probation, coupled with the purpose of the state exclusionary rule of providing vindication for privacy violations rather than being simply a deterrent for police, mandate that the state

exclusionary rule applies to SSOSA revocation proceedings as well as proceedings to revoke parole.

In examining whether evidence should be excluded from a proceeding because it is the fruits of unlawful search, courts start with the familiar premise that warrantless searches are per se unconstitutional but there are exceptions to the warrant requirement. See State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). One of those exceptions is for an “inventory search.” See State v. Houser, 95 Wn.2d 143, 156, 622 P.2d 1218 (1980). Although most commonly used when a car is impounded into police custody and its contents searched, in general an “inventory search” is a search conducted by police of someone’s property, made after that person is taken into custody, for three reasons: 1) to protect that property, 2) to protect police against false claims of theft by the owner and 3) to protect police from danger from the property, such as if there were dangerous chemicals inside a car. See State v. White, 135 Wn.2d 761, 769-70, 958 P.2d 982 (1998).

Under Article 1, § 7, however, the scope and purpose of an inventory search is not unlimited. First, there must be “reasonable and proper justification” for the impoundment of the car or other items. See State v. Montague, 73 Wn.2d 381, 385, 438 P.2d 571 (1968). Second, the search must not be “made as a general exploratory search for the purpose of finding evidence of a crime” but rather “made for the justifiable purpose of finding, listing, and securing from loss, during the arrested person’s detention, property belonging to him.” Id. Searches which exceed these limits are unlawful. See White, 135 Wn.2d at 769-71.

Because the photos were the fruits of Bohon's unlawful search of Muldrow's phone, they should have been suppressed. And because those photos were the sole basis for the court's finding on allegation 5, the court's finding of guilt for that allegation must be reversed.

As a result, the court's decision to revoke must also be suppressed. As noted above, the court decided to revoke the SSOSA based upon the "very significant violations" it had found, thus apparently considering all of the five allegations in reaching its conclusion. 19RP 42-43. Thus, result, because the court's decision to revoke Mr. Muldrow's SSOSA was based upon at least in part on the unlawfully gathered evidence which should have been suppressed, reversal of the allegation based upon that evidence, allegation 5, compels reversal of the revocation as well. This Court should so hold and should reverse.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 24th day of July, 2009.

Respectfully submitted,



KATHRYN A. RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

CERTIFICATION OF SERVICE BY MAIL

I hereby declare under penalty of perjury under the laws of the State of Washington that I deposited a true and correct copy of the attached document to opposing counsel and appellant by placing it in the United States Mail first-class postage prepaid to the following addresses:

TO: Kathleen Proctor, 946 County City Building, 930 Tacoma Ave. S,
Tacoma, WA. 98402;

TO: Curtis Muldrow, DOC 854815, WCC, P.O. Box 900, Shelton, WA.
98584.

DATED this 27th day of July, 2009.



KATHRYN A. RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

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