

NO. 40711-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES VICTOR COLLINS,

Appellant.

[Signature]
STATE DEPUTY

STATE OF WASHINGTON

10 OCT 21 PM 12:39

COURT OF APPEALS
DIVISION II

PM 10/20/10

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

The Honorable Lisa Worswick, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The State's failure to inform appellant of all the facts it relied on to prove the alleged SSOSA violation denied appellant due process.

Issue pertaining to assignment of error

The State sought revocation of appellant's SSOSA based on its allegation that appellant failed to comply with his treatment rules and conditions. Where the State failed to inform appellant of all the facts on which it would rely to prove the alleged violation, was appellant denied due process?

B. STATEMENT OF THE CASE

In July 2006, appellant James Victor Collins pleaded guilty in Pierce County Superior Court to two counts of rape of a child in the first degree. CP 23. The court imposed a sentence of 130 months to life but suspended it under the Special Sex Offender Treatment Alternative. CP 27; RCW 9.94A.670. Under the terms of his SSOSA, Collins served six months in confinement then commenced sex offender treatment with Daniel DeWaelsche. CP 28; RP¹ 59.

On January 29, 2010, the State filed a petition seeking to revoke Collins's SSOSA. CP 35-38. In the petition the State alleged that Collins

¹ The Verbatim Report of Proceedings from the revocation hearings on 3/26/10 and 4/12/10 is contained in a single volume, designated RP.

failed to comply with rules and conditions of sexual deviancy treatment, resulting in his termination from treatment. CP 35-36.

A letter from DeWaelsche to Collins's community custody officer (CCO) was filed with the court, indicating that Collins had been terminated from treatment for violating several treatment rules and probation conditions. CP 39. DeWaelsche explained that Collins failed a polygraph when he denied allegations by his former girlfriend, Shawna Gibbs, that he was stalking her on December 6, 2009. CP 39. Then Collins failed a second polygraph when he denied allegations that he had contacted Gibbs after a restraining order was in place, and that, during their relationship, he took nude photographs of her and had sexual contact with her while she was sleeping. CP 39-40.

Michael Cheney, Collins's CCO, filed a notice of violation on February 12, 2010, alleging Collins failed to comply with sexual deviancy treatment, resulting in termination from treatment. Supp. CP (Report from Department of Corrections, at 1-2). As supporting evidence, Cheney referenced the two failed polygraphs as well as the allegations by Gibbs that Collins was stalking her and had tried to contact her after the restraining order was issued, and that before they broke up Collins took nude photos of her while she was sleeping, and he had sex with her while she was sleeping. Supp. CP (DOC Report, at 3). Cheney also reported

that he found a photograph in Collins's motel room of five children, including Collins's victim. Id.

The State alleged in its motion to revoke Collins's SSOSA that Collins was in arrears on his legal financial obligations. CP 41. The other facts alleged by the State were those described by DeWaelche and Cheney. CP 41-44.

At the revocation hearing before the Honorable Lisa Worswick, Gibbs testified that she and Collins had been together close to four years, but they ended their relationship in June or July 2009. RP 7, 26. Although they continued to have consensual contact with each other after the break up, Gibbs filed a petition for a protection order in December 2009, because she believed Collins had been following her. RP 12, 29-30. She thought Collins might have tried to call her twice after that, because the phone number from the motel where he was staying appeared on her caller I.D. RP 11-12. Gibbs also testified that a couple of times a week she noticed Collins in his car, driving the opposite direction, as she was leaving work. RP 15-16.

Gibbs testified that she did not think Collins took the terms of his SSOSA seriously, alleging that he denied committing his offense and tried to falsify polygraphs. RP 9-10. Gibbs also repeated her allegations that during their relationship Collins took nude photos of her and initiated

sexual intercourse with her while she was sleeping. RP 20. In addition, she claimed that Collins had convinced her to have sex with him and another man, and that he had video taped the encounter without her knowledge or consent. RP 24. Gibbs's mother testified that she had seen the video of her daughter having sex with Collins and another man. RP 49.

DeWaelsche, Collins's treatment provider, testified that Collins participated in treatment for just over three years, but he was terminated in February 2010, after failing the polygraphs regarding Gibbs's allegations. RP 60-62. DeWaelsche testified that having sex with Gibbs while she was sleeping, taking photographs of her while she was sleeping, and video taping a sexual encounter without her consent would have been violations of Collins's treatment conditions. RP 69-71.

Collins's CCO testified about Gibbs's allegations and Collins's polygraphs. RP 81-85. Although Collins had been compliant with his supervision other than these recent events, the CCO recommended that Collins's SSOSA be revoked. RP 88, 93.

After this evidence from the State, Collins presented testimony from Vincent Gollogly, a sex offender treatment provider who had reviewed Collins's case. Gollogly testified he would be willing to accept Collins into his SSOSA program. RP 97-98, 101.

Collins also testified, denying Gibbs's allegations. RP 132-34, 154. He believed the polygraphs results were erroneous because he was nervous when the tests were administered, since he had been told he would be sent to prison if he failed. 155-56.

At the close of evidence, the court stated that it found Gibbs and her mother credible. It believed that Collins had unwanted contact with Gibbs after the restraining order was issued and that he took nude photographs of Gibbs, initiated sex with her while she was sleeping, and made a video of Gibbs having sex with him and another man. Further, the court found that Collins failed to disclose these actions in treatment. RP 183. The Court concluded that Collins failed to make adequate progress in treatment, as evidenced by these acts, and it revoked his suspended sentence. RP 183; CP 71-73.

C. ARGUMENT

THE STATE'S FAILURE TO INFORM COLLINS OF ALL THE FACTS ON WHICH IT RELIED IN SEEKING REVOCATION VIOLATED COLLINS'S RIGHT TO DUE PROCESS.

An offender's SSOSA may be revoked at any time if a court is reasonably satisfied that the offender has violated a condition of his suspended sentence or failed to make satisfactory progress in treatment.

RCW 9.94A.670(11)²; State v. Dahl, 139 Wn.2d 678, 990 P.2d 396 (1999). The revocation of a suspended sentence is not a criminal proceeding, and the offender does not have the same due process rights as afforded at the time of trial. Dahl, 139 Wn.2d at 638. Nonetheless, an offender facing revocation is entitled to minimal due process rights, including

(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.

Dahl, 139 Wn.2d at 683 (citing Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)).

“Due process requires 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. In Dahl, the State sought revocation of Dahl’s SSOSA, alleging he failed to make reasonable progress in treatment. Treatment notes provided to Dahl included descriptions of two incidents, which the court relied on in finding he had failed to make reasonable progress in treatment and revoking his suspended sentence. Dahl, 139 Wn.2d at 683.

² Former RCW 9.94A.670(10), in effect at the time of Adams’s offenses, has been renumbered but is substantively unchanged in the current version, effective August 1, 2009.

On appeal Dahl argued that his right to minimal due process was violated because the State did not allege the incidents as separate violations. Dahl, 19 Wn.2d at 683-84. The Supreme Court disagreed. It noted that the two incidents were not raised as separate SSOSA violations but rather as evidence of Dahl's failure to make progress in treatment. Dahl, 139 Wn.2d at 684. Due process was satisfied because Dahl had notice of that alleged violation and the facts the State would rely on to prove it. Dahl, 139 Wn.2d at 685.

Here, as in Dahl, the State alleged that Collins failed to comply with the rules and conditions of his sexual deviancy treatment. But unlike in Dahl, Collins was not informed of all the facts on which the State relied to prove this allegation. Prior to the hearing, the treatment provider's letter and the CCO's report were filed with the court. Neither document mentions the allegation that Collins video taped Gibbs having sex with him and another man without her consent. CP 39-40; Supp. CP (DOC Report). Nonetheless, relying on testimony from Gibbs and her mother, the court found Collins had made the video and failed to disclose that fact in treatment, constituting a violation of his treatment conditions. RP 183. Because Collins had no notice of these facts, the court's revocation of his SSOSA based in part on this evidence violates Collins's right to due process.

D. CONCLUSION

Collins's did not receive notice of all the facts the State relied on to prove he violated the conditions of his suspended sentence. Because Collins was denied due process, this court must reverse the revocation of his SSOSA and remand for a new hearing.

DATED this 20th day of October , 2010.

Respectfully submitted,



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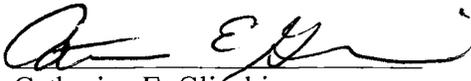
Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant and Supplemental Designation of Clerk's Papers in *State v. James Victor Collins*, Cause No. 40711-6-II, directed to:

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



Catherine E. Gliński
Done in Port Orchard, WA
October 20, 2010

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