

No. 42185-2-II

IN THE
COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

STEVEN D. WHITCHER,
Appellant.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

Point I: When the State Did Not Give Written Notice Mr. Whitcher's SSOSA Sentence Could be Revoked for Not Being Amenable to Treatment and Posing a Danger to Others, His Due Process Rights were Violated

Although the due process rights accorded a defendant at a revocation hearing are minimal, they unequivocally include "written notice of the claimed violations." State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999); In re Personal Restraint of Blackburn, 168 Wn.2d 881, 884, 232 P.3d 1091 (2010). Because the State is unable to refute the lack of such notice in this case, this Court should reverse the trial court's revocation of Mr. Whitcher's SSOSA sentence.

A. The State Violated Mr. Whitcher's Due Process Rights by Providing No Written Notice that it Sought Revocation for Not Being Amenable to Treatment and Posing a Danger to Others

The State cannot dispute two central facts that establish the constitutional violation in this case. First, the superior court terminated Mr. Whitcher's involvement in SSOSA because Mr. Whitcher was not amenable to SSOSA treatment, posed a danger to others, and was terminated from treatment. CP 93-94.

Second, the State's amended revocation petition did not list either "not amenable to treatment" or "poses a danger to others" as reasons for revocation. Instead, it cited four other reasons, including the fact that Mr. Whitcher was terminated from treatment. CP 25-26. Thus, based on the revocation order and the State's amended revocation petition, the trial court revoked Mr. Whitcher for two reasons for which the State failed to provide written notice, violating Mr. Whitcher's due process rights.

In the face of these incontrovertible facts, the State argues Mr. Whitcher should have realized the State sought revocation on the grounds that he was not amenable to treatment because of the evidence supporting the written violations provided in the DOC Court-Notice of Violation Form (Notice). *Brief of Respondent* (State's Br.) at 8-9.¹ Mr. Whitcher does not dispute the notice of individual incidents provided

1. The State does not attempt to dispute Mr. Whitcher's contention that he received no notice of one of the court's reasons for revocation: that he posed a danger to society. See *State's Br.* Thus, it apparently concedes Mr. Whitcher's due process rights were violated on this point.

in that Notice. However, the State clearly and specifically offered that evidence in support of its four written violations. CP 30-33 (under the caption, "Violation(s) Specified," the four alleged violations are set forth; under the caption "Supporting Evidence:", evidence for each of the alleged violations is given in turn). The State has no basis to suggest now that evidence supporting the four written violations actually provided written notice of a fifth.

Significantly, moreover, nowhere in the Notice did the State aver Mr. Whitcher was not amenable to treatment. CP 29-35. Indeed, prior to the hearing, "not amenable to treatment" was not even suggested as a reason for his termination from therapy. See CP 32-33; CP 66-67; *Appellant's Brief* at 16-19. Under these circumstances, the State's argument that the evidence supporting the written violations, along with the CCO's opinion that "Mr. Whitcher is not a good candidate for the SSOSA program" should have been understood as written notice it sought revocation for his

unamenability to psychosexual treatment is meritless.
See State's Br. at 8-9; CP 35.

Further, the State's reliance on Dahl in this context is misplaced. In Dahl, the Supreme Court found no due process violation when the trial court revoked a SSOSA sentence primarily for reasons given as evidence in support of the written violation, which was failure to make satisfactory progress in treatment. Dahl, 139 Wn.2d 678. Here, by contrast, the State asks this Court to hold that evidence offered in support of its written violations actually provided notice of a completely separate violation. Such a holding would turn Dahl and this State's jurisprudence on its head. It would require a defendant to search the State's evidence of its named violations to try to discern any other possible violations that evidence might prove - and then be prepared to defend himself against those. Such a result would utterly nullify the constitutional notice requirement.

For all these reasons, the State failed to establish it provided the constitutionally-required

written notice of the alleged violations and reversal is necessary. Without adequate written notice, Mr. Whitcher was subject to "be[ing] misled, subjected to guessing games, or asked to hit a moving target," In re Blackburn, 168 Wn.2d 881, 886 (warning of risk, without adequate written notice, "that DOC could surprise the offender with a new legal theory at the hearing"), and this Court should reverse.

Failing to show the requisite written notice, the State now appears to argue that Mr. Whitcher must have had actual notice since he defended himself against the State's evolving theory at the revocation hearing. *State's Br.* at 9-10. The State, however, can cite no authority holding actual notice sufficient in lieu of written notice. See *id.* Moreover, the record establishes that Mr. Whitcher did not have actual notice the court contemplated revoking him for being unamenable to treatment or a danger to others. See Part B, below.

B. The State Violated Mr. Whitcher's Due Process Rights by Changing Legal Theories During the Revocation Hearing

Having sought a revocation hearing based on four written violations, the State added a new one during the hearing. On the first day of the hearing, the prosecutor claimed Mr. Whitcher's therapist's testimony would be that she terminated him because he was unamenable to treatment. This led the court to show interest in Mr. Whitcher's amenability to treatment. See *State's Br.* at 9-10.

Specifically, Mr. Whitcher objected on relevance grounds to the CCO testifying about Mr. Whitcher's arguments regarding his treatment provider. 1VRP 13 ("we have already agreed that he has been terminated from sex offender treatment from Jeanglee Tracer"). In response, the prosecutor averred: "Part of [Mr. Whitcher's] termination from treatment with Ms. Tracer is his lack of inability to treatment [sic]. His discussions with the CCO about his willingness to go through the treatment is relevant to that issue of amenability." 1VRP 13. The court overruled the

defendant's objection, stating: "This goes at least to the issue of his amenability to treatment." 1VRP 15.

Notably, this conversation appears to be the first reference in the record to Mr. Whitcher not being amenable to treatment. See State's Br. at 9. As such, it is a prime example of the State "surpris[ing] the offender with a new legal theory at the hearing." Blackburn, 168 Wn.2d 881, 886. Accordingly, this surprise theory violated Mr. Whitcher's due process rights and its introduction at the hearing should not be condoned by the Court. See *Appellant's Brief* at 22-24.²

Moreover, the prosecutor's prediction was incorrect: Tracer did not actually testify she terminated Mr. Whitcher for not being amenable to treatment. To the contrary, Tracer testified she terminated Mr. Whitcher for reasons already in the record: because of his unsupervised contact with a

2. Although the State points out Mr. Whitcher did not object to the prosecutor's comment about not being amenable to treatment, it does not argue the failure to object at trial precludes appellate review. Indeed, such an argument would be unavailing as this issue is plainly a manifest error affecting a constitutional right. RAP 2.5(a)(3).

minor and his deception regarding his Facebook account. 2VRP 67-71, 71 ("Based on those two issues is why I terminated him."). Given this context, the prosecutor's remark - unsubstantiated by Tracer's testimony - must have seemed like a red herring. For these reasons, the State's adoption of a new legal theory at the hearing violated Mr. Whitcher's due process rights and was no substitute for written notice of this ground for revocation.

Moreover, the record reveals that as late as closing arguments, Mr. Whitcher was unaware he could be revoked for not being amenable to treatment. Accordingly, the State's argument that the fact that he located another therapist shows he was defending himself against this allegation mischaracterizes what happened below. See *State's Br.* at 10.

Demonstrating that another therapist was willing to treat him was part of Mr. Whitcher's good-faith defense against alleged violation number four, being terminated from treatment, not a defense against the new charge the State argued at the hearing, that he was

not amenable to treatment. Throughout the proceeding, Mr. Whitcher did not dispute that he was terminated from therapy, only the reasons for the termination: He argued the termination was a result of misunderstandings and mistakes, not bad faith. See, e.g., 2VRP 73-78 (Mr. Whitcher's cross examination of therapist to show his problems with payment); 3VRP 190-91 (on direct examination, Mr. Whitcher explained his misunderstanding about who should provide treatment). For this reason, he found a therapist willing to treat him to show his good faith intention to benefit from therapy in the future.

That Mr. Whitcher sought Dr. Arnholt's treatment, not his opinion as to a new violation, is evidenced by events at the hearing. The letter from Dr. Arnholt admitted at the hearing plainly states Mr. Whitcher sought to be one of Dr. Arnholt's patients. Def. Exh. No. 9 ("The information contained in this correspondence is provided as a response to your request for an assessment regarding whether or not Mr. Whitcher could be accepted into SSOSA treatment with

the undersigned.”). In the letter, Dr. Arnholt did not address Mr. Whitcher’s amenability to treatment, but under what conditions he anticipated treating Mr. Whitcher: “If Mr. Whitcher is allowed to begin SSOSA treatment with the undersigned . . .” *Id.*

Indeed, the record shows counsel apparently did not believe Dr. Arnholt’s testimony was dispositive of any of the issues before the court. He did not intend to bring Dr. Arnholt in to testify until the court advised him to do so:

I think that the Court, in theory, can take the position that it doesn’t matter what Mr. Arnholt says, what he has done. I’m going to revoke him; or, the Court can say, I want to hear from Mr. Arnholt. . . . Again, it is up to the Court to make the initial determination whether or not you want to hear from Mr. Arnholt, whether it is going to make a difference to the Court at all.

3VRP 208-09 (transcript reads “Mr. Arnholt” not Dr. Arnholt throughout this passage). Had counsel understood the court could revoke Mr. Whitcher for not being amenable to treatment, not merely for being terminated from treatment, counsel surely would have insisted on Dr. Arnholt’s testimony.

Significantly, even in closing arguments, Mr. Whitcher's counsel appeared unaware Whitcher faced revocation for not being amenable to treatment. Counsel's argument was organized solely around the four written alleged violations. 4VRP 244-52. After admitting violation number four, counsel explained how the problems leading to the termination arose. 4VRP 249-51 (discussing Mr. Whitcher's misunderstanding about who should be providing therapy and his cash flow problems). Because of these forces out of Mr. Whitcher's control, counsel asked the court to give him a second chance by letting Dr. Arnholt treat him. 4VRP 251-52 ("Your Honor, what I'm asking the Court to do is to allow Mr. Whitcher one last time. . . . If the Court allows him to go to Dr. Arnholt as a new treatment provider . . . [h]e is going to have to . . . accept what he is told."). At no point did counsel argue Mr. Whitcher should not be revoked because he was not amenable to treatment, a clear indication that at closing arguments he still had no idea Whitcher could be revoked for this reason. See 4VRP 244-52.

Because the State failed to provide the required written notice of its alleged grounds for revocation, the State changed its legal theory at the hearing, and Mr. Whitcher did not realize he could be violated for not being amenable to treatment during the hearing, as well as for the reasons set forth in Appellant's Brief, this Court should reverse the trial court's revocation order.

Point II: Revocation of Mr. Whitcher's Suspended Sentence for Not Being Amenable to Treatment, Posing a Danger to Others, and Being Terminated From Treatment Was Illegal Under RCW 9.94A.670(11)

The trial court abused its discretion when it revoked Mr. Whitcher's SSOSA sentence for neither of the two permissible statutory reasons: a) violation of a condition of his suspended sentence, or b) failure to make satisfactory progress in treatment. RCW 9.94A.670(11). The State does not dispute that these are the only two grounds for revocation of a SSOSA sentence. *State's Br.* at 11-12. Instead, it argues that, notwithstanding the nonconforming language in the revocation order, the court actually revoked Mr.

Whitcher for both of these statutory reasons. *See id.*

This argument does not withstand scrutiny.

A. The Court Did Not Revoke SSOSA Because Mr. Whitcher Violated a Condition of His Suspended Sentence

The trial court articulated, in writing, the reasons it revoked Mr. Whitcher's SSOSA sentence: because Mr. Whitcher was not amenable to SSOSA treatment, posed a danger to others, and was terminated from treatment. CP 93-94. The State argues that termination from treatment actually demonstrated failure to comply with "the requirements of his suspended sentence" that Mr. Whitcher "remain in treatment, and comply with all the conditions of the treatment provider." *State's Br.* at 12. This argument fails when "remain in treatment" was not a condition of the sentence and the court specifically found Mr. Whitcher could not be revoked for violation of any condition of the treatment provider.

First, "remain in treatment" is not a requirement of Mr. Whitcher's SSOSA sentence. The closest condition compelled Mr. Whitcher to "attend and

complete sexual deviancy treatment with: Comte's & Associates." CP 10, 15. But the State never alleged Mr. Whitcher should be revoked for violation of this condition. Indeed, one of the first conflicts Mr. Whitcher had with his CCO was when she required him to obtain treatment from Jeanglee Tracer, not Comte's & Associates as required by his judgment. 1VRP 11-13. Thus, due to the CCO's direction, this condition was not followed from the inception of treatment. Accordingly, the trial court could not have revoked Mr. Whitcher's SSOSA sentence for violation of either this actual condition or the nonexistent condition that he "remain in treatment."

Next, Mr. Whitcher did not violate any conditions of his treatment provider. Although the court revoked SSOSA because Mr. Whitcher was terminated from treatment, it specifically found that the reasons for termination did not provide grounds for revocation. In her letter terminating treatment, Tracer alleged four reasons for termination (two more than admitted in her testimony): not paying on time, getting arrested on charges of theft and trespass, having unsupervised

contact with a minor, and having a Facebook account in a woman's name. CP 66-67; *but see* 2VRP 76 ("I did not terminate him because he owed me money).

Significantly, the trial court did not revoke Mr. Whitcher for any of these reasons. Instead, the court found Mr. Whitcher's difficulty with payment to be "not too big a deal." 4VRP 261. It held the arrest was not a violation of law-abiding behavior. 4VRP 257. It found he did not violate the condition that he not have unsupervised contact with a minor. *Id.* Finally, Tracer admitted she had not informed Mr. Whitcher he was not to have a Facebook account. 2VRP 69-70. Thus, his Facebook account also represented no violation of a condition of treatment.

For all these reasons and the reasons set forth in Appellant's Brief, the trial court did not revoke Mr. Whitcher's involvement in SSOSA because he violated conditions of his suspended sentence.

B. The Court Did Not Revoke SSOSA Because Mr. Whitcher Failed to Make Satisfactory Progress in Treatment

The State's argument that the court revoked Mr. Whitcher's SSOSA sentence for his failure to make satisfactory progress in treatment is specious. See *State's Br.* at 12. At no point in the proceedings below did anyone suggest Mr. Whitcher was failing to make satisfactory progress in treatment. Tracer did not use it as a basis for terminating therapy. CP 66-67; 2VRP 67-71. The State did not argue it as a basis for revocation. 4VRP 236-44; 252-55. The CCO did not include it in the Notice. CP 29-35. The court did not mention it as a reason for revoking Mr. Whitcher's SSOSA sentence. 4VRP 255-78. Patently, Mr. Whitcher was not revoked for failing to make satisfactory progress in treatment.

Indeed, Mr. Whitcher had not been in treatment long enough for his progress to be evaluated. Mr. Whitcher first met with Tracer as scheduled on October 27, 2010. 2VRP 63-64. He missed the next appointment. 2VRP 65. He met with her again on November 8, attended

a double group session on November 15, and attended another group session on November 29. 2VRP 65-66. Thus, he had two private and three group sessions, at most, before his arrest in December 2010. Under these circumstances, insufficient time had passed to determine whether Mr. Whitcher was making satisfactory progress in treatment and no one in the proceedings below attempted a contrary argument.

For these reasons and the reasons set forth in Appellant's Brief, nothing in the record supports the argument that Mr. Whitcher was revoked for failure to make satisfactory progress in treatment. Furthermore, if the court had revoked for this reason, without prior notice to Mr. Whitcher, such revocation would have violated his due process rights.

For all these reasons and the reasons set forth in Appellant's Brief, this Court should reverse the trial court's order revoking Mr. Whitcher's SSOSA sentence.

* * * * *

Mr. Whitcher relies on Appellant's Brief for the remainder of his arguments.

II. CONCLUSION

For all of these reasons and the reasons set forth in Appellant's Brief, Steven D. Witcher respectfully requests asks this Court to reverse the superior court's ruling revoking his SSOSA sentence.

Dated this 30th day of March 2012.

Respectfully submitted,

/s/ Carol Elewski
Carol Elewski, WSBA # 33647
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on this 30th day of March 2012, I caused a true and correct copy of Appellant's Brief to be served by e-filing, on:

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