

No. 44471-2-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

MARLOWE MILTON WESTRA,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 06-1-02889-1  
The Honorable Ronald Culpepper, Judge

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OPENING BRIEF OF APPELLANT

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## I. ASSIGNMENTS OF ERROR

1. The trial court erred when it revoked Marlowe Westra's special sex offender sentencing alternative suspended sentence.
2. The trial court erred when it found that Marlowe Westra violated the terms of his suspended sentence by having contact with his granddaughters and failing to report that contact.
3. Revocation of Marlowe Westra's suspended sentence for having contact with his granddaughters and failing to report that contact failed to comport with due process because Westra had inadequate notice that the particular contact engaged in was forbidden.
4. The trial court erred when it found that Marlowe Westra violated the terms of his suspended sentence by failing to make progress in treatment because this fact is not supported by the record.
5. The trial court erred when it found that Marlowe Westra violated the terms of his suspended sentence when he was terminated from a sex offender treatment program.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Did Marlowe Westra have adequate notice that “contact” included peering at his three minor granddaughters through a window and being present but not visible in his house when his granddaughters unexpectedly came to visit their grandmother? (Assignment of Error 1, 2 & 3)
2. Did the trial court err when it found that Marlowe Westra violated the terms of his suspended sentence by failing to make progress in sex offender treatment, where Westra’s treatment provider testified that Westra was making progress? (Assignment of Error 1 & 4)
3. Did the trial court err when it found that Marlowe Westra violated the terms of his suspended sentence when he was terminated from sex offender treatment, where Westra was terminated from one program but was offered treatment in another program? (Assignment of Error 1 & 5)
4. Did the trial court err when it found that Marlowe Westra violated the terms of his suspended sentence when he was terminated from a sex offender treatment program, where the terms of the suspended sentence only require that Westra attend and complete a treatment program?

(Assignment of Error 1 & 5)

### III. STATEMENT OF THE CASE

Marlowe Westra pleaded guilty in 2007, to two counts of first degree child molestation. (CP 4-15, 56-67, 70) The court imposed a sentence of 89 months to life, but suspended all but 171 days of the sentence under the Special Sex Offender Sentencing Alternative (SSOSA). (CP 70, 74) The conditions of the SSOSA included requirements that Westra: attend and complete sexual deviancy treatment; have no "direct or indirect contact" with the victims (his granddaughters) or minor children; and not own, use or possess a firearm or ammunition. (CP 53, 75, 80, 81)

Westra began a sex offender treatment program run by Dr. Daniel Yanish, but because he did not make adequate progress in that program, Westra transferred in June of 2011 to Dr. Daniel DeWaelsche's program. (CP 81, 103; RP 7) According to Dr. DeWaelsche, Westra attended treatment sessions and participated when prompted. (RP 9, 17, 24) As of April of 2012, Dr. DeWaelsche believed that Westra was receptive to treatment and gaining an understating of his offense cycle and triggers, and that Westra was making progress. (RP 35, 36, 47)

Community Corrections Officer Kimberly Carrillo was

assigned to supervise Westra in March of 2012. (RP 59) Officer Carrillo had several conversations with Westra about activities and behaviors that were inappropriate, such as the presence of wine in the home he shared with his wife, or the presence of photographs of his granddaughters. According to Officer Carrillo, Westra gave inconsistent and varying explanations for the presence of these items, and she felt he was not being totally forthcoming. (RP 60-61, 62, 63-64)

Officer Carrillo's concerns prompted a search of Westra's house and car in August of 2012. (RP 62) Officer Carrillo and fellow CCO Sally Saxon conducted the search and found children's belongings throughout Westra's house. (RP 65, 97, 98; CP 105) They also found jugs of wine and .22 caliber ammunition. (RP 69, 70; CP 105)

Westra told the Officers that his daughter often brought his granddaughters to the house to visit his wife, their grandmother. (RP 65-66) Westra explained that when he knew his granddaughters were coming he would leave and stay away until they left, but occasionally they would drop by unannounced. (RP 65-66, 129) When that happened, he explained, he would immediately go to the basement or the detached garage to avoid

contact with his granddaughters. (RP 65-66, 101)

However, Westra did admit that on one occasion he watched his granddaughters through the window of the garage as they played outside, and he noted how they had grown and were developing into young women. (RP 71, 72, 73, 74, 101) According to Officer Carrillo, this type of “proximity contact” is something that Westra should report to his CCO. (RP 73)

Officers Carrillo and Saxon both felt that Westra was not being honest and forthcoming about his contacts and his lifestyle, and testified that it would be difficult to properly supervise Westra under the circumstances. (RP 75, 76, 103, 104) Both CCOs felt that Westra’s SSOSA should be revoked. (RP 78, 104)

Officer Carrillo passed the information she gathered to Dr. DeWaelsche. (RP 23, 42) Dr. DeWaelsche was concerned that Westra did not report the fact that his granddaughters had been in the home when he was on the property, or that he had seen his granddaughters through the window. (RP 22-23, 26, 40-41, 49) Dr. DeWaelsche was also troubled by what he felt was Westra’s lack of candor in general, and felt that he could not treat Westra if he could not trust that Westra was being honest and forthcoming about his lifestyle and activities. (RP 17, 24, 26, 49) So Dr.

DeWaelsche terminated Westra from his treatment program. (RP 23)

On August 24, 2012, the State filed a petition to revoke Westra's SSOSA, alleging that he was not in compliance with the conditions of the suspended sentence. (83-88, 89-94) Following a hearing, the court agreed and revoked Westra's SSOSA. (RP 182; CP 60, 152-54) This appeal timely follows. (CP 155)

#### **IV. ARGUMENT & AUTHORITIES**

A superior court may revoke an offender's SSOSA suspended sentence at any time if it is reasonably satisfied that the offender either (1) violated a condition of his suspended sentence, or (2) failed to make satisfactory progress in treatment. RCW 9.94A.670(11); State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999). The trial court in this case revoked under the first of these grounds, finding that Westra violated the conditions of his suspended sentence by:

- having contact with his three minor granddaughters by peering at them through a window and by his presence when they were in his house;
- not reporting the contact with his three granddaughters to either his CCO or his treatment provider;
- failing to make progress in treatment;
- being terminated from sex offender treatment;
- being in possession of .22 caliber ammunition.

(CP 59-60) The trial court erred because Westra did not have notice that the type of contact he had with his granddaughters was forbidden, and because the remaining facts are either not supported by the record or do not constitute a violation of his suspended sentence.

A. THE TRIAL COURT'S REVOCATION OF WESTRA'S SSOSA FOR HAVING CONTACT WITH HIS GRANDDAUGHTERS AND FAILING TO REPORT THAT CONTACT FAILED TO COMPORT WITH DUE PROCESS BECAUSE WESTRA HAD INADEQUATE NOTICE THAT SUCH CONTACT WAS FORBIDDEN.

Both the federal and state constitutions require adequate notice of conduct that is subject to sanction. See City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990) (due process requires fair warning of proscribed conduct); U.S. Const. amend. 14; Wash. Const art. I, § 3. An individual on a SSOSA suspended sentence has a due process right to sentencing conditions that are sufficiently clear in describing what conduct will result in being returned to prison under the original sentence. See United States v. Guagliardo, 278 F.3d 868, 872 (9th Cir. 2002).

Absent a statement of the conditions to be followed during the community supervision portion of a sentence, the defendant is not given fair notice of the requirements to be followed at pain of sanction. See State v. Broadaway, 133 Wn.2d 118, 135-36, 942

P.2d 363 (1997) (judgment and sentence failed to place defendant on notice of period of time he was required to report for supervision). This notice must be in writing. See WAC 137-104-040 (“When placed on community custody, offenders shall be provided with written notice of all court and department-imposed conditions and/or requirements.”)

Appendix F of the judgment and sentence in this case states that Westra “shall not have direct or indirect contact with the victim of the crime.” (CP 80) Appendix G states that Westra “shall not have any contact with the victims . . . or any minor child.” (CP 81) And Appendix H states that Westra shall “[h]ave no contact with any minor” and shall not “initiate or prolong physical contact with children[.]” (CP 53) This language did not provide Westra adequate notice that contact such as that alleged in this case would violate the terms of the suspended sentence and result in revocation of his SSOSA.

No notice was provided to Westra under the above standards that mere “visual contact” (RP 72) or “proximity contact” (RP 73) was forbidden. The terms “direct” and “indirect” are not defined or explained in the appendices. It is not clear that simply being in the vicinity of his granddaughters, even while making every

effort to ensure that his granddaughters did not have to hear, see, or otherwise have any interaction with him, still constitutes “contact” under the terms of the suspended sentence.

The trial court’s decision to revoke SSOSA on the grounds that Westra violated the no-contact portions of the suspended sentence was thus improper because it violated Westra’s due process right to notice of prohibited contact.

B. THE REMAINING FACTS RELIED UPON BY THE TRIAL COURT TO REVOKE THE SSOSA SENTENCE ARE EITHER NOT SUPPORTED BY THE RECORD, DO NOT CONSTITUTE A VIOLATION OF HIS SUSPENDED SENTENCE, OR ARE SO MINIMAL THAT IT IS LIKELY THE COURT WOULD NOT HAVE REVOKED ON THAT FACT ALONE.

A superior court’s decision to revoke a SSOSA is reviewed under an abuse of discretion standard. State v. McCormick, 166 Wn.2d 689, 705-06, 213 P.3d 32 (2009); State v. Partee, 141 Wn. App. 355, 361, 170 P.3d 60 (2007). A superior court abuses its discretion if its decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” McCormick, 166 Wn.2d at 706 (quoting State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

The trial court’s decision to terminate SSOSA in this case was an abuse of discretion. First, the court found that Westra

violated the terms of his SSOSA by failing to make progress in treatment. (CP 60) This finding is not supported by the record, as Dr. DeWaelsche testified that Westra was making progress in treatment. (RP 35, 36, 47)

Next, the court also found that Westra violated the terms of his SSOSA when he was terminated from treatment. (CP 60) This is not entirely correct, however. Though Dr. DeWaelsche did terminate Westra from his treatment program, Westra was accepted for treatment into another approved sex offender treatment program Tracer Therapy, Inc. (RP 136-37, 167; Exh. P10) So Westra was not “terminated from treatment,” he was simply terminated from one treatment *provider*. Furthermore, the suspended sentence conditions require Westra to “attend and complete” a sex offender treatment program. (CP 81) Westra was attending a treatment program, and had been accepted into a new program so that he could continue in his effort to complete a treatment program. So he did not violate this condition of his SSOSA either.

Finally, the court found that Westra violated the terms of his SSOSA by being in possession of .22 caliber ammunition. (RP 60) However, the court also specifically states that “the court does not

consider this a major violation.” (CP 60) It seems from this notation that the court would not have revoked Westra’s SSOSA because of this infraction alone. Therefore, because the remaining findings relied upon by the trial court were invalid, this Court should not uphold the SSOSA revocation on this sole “minor” violation.

**V. CONCLUSION**

The trial court abused its discretion and violated Westra’s due process rights when it revoked his SSOSA suspended sentence on impermissible and unsupported grounds. This Court should reverse the trial court’s order revoking Westra’s SSOSA sentence and return him to the community so he can continue to make progress in sex offender treatment.

DATED: September 3, 2013



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**CERTIFICATE OF MAILING**

I certify that on 09/03/2013, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to Marlowe M. Westra, DOC# 305258, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.



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STEPHANIE C. CUNNINGHAM, WSBA #26436

# CUNNINGHAM LAW OFFICE

**September 03, 2013 - 8:34 AM**

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