

REC'D  
MAY 30 2014  
King County Prosecutor  
Appellate Unit

COA NO. 71312-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH WHITEMAN,

Appellant.

*Filed*  
RECEIVED  
COURT OF APPEALS  
DIVISION ONE  
MAY 30 2014

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

The Honorable Michael C. Hayden, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in revoking appellant's suspended sentence. CP 92-93.

2. The court erred in denying appellant's motion for reconsideration of the order revoking the suspended sentence. CP 119-20.

3. Appellant's right to due process was violated in connection with the revocation of the suspended sentence.

4. The court erred in finding appellant "failed to make reasonable progress in a sexual deviancy program with Bellevue Community Services." CP 92.

Issue Pertaining to Assignments of Error

Due process requires a person facing revocation of his suspended sentence be properly notified of the alleged violations supporting revocation and a statement by the court as to the evidence relied upon as the basis for revocation. Is reversal required because appellant received inadequate notice of an alleged violation that formed the basis for the court's revocation of his suspended sentence and the court failed to make an adequate statement of the evidence it relied on to revoke?

B. STATEMENT OF THE CASE

In 2008, the State charged Kenneth Whiteman with first degree child molestation, second degree child molestation and second degree

incest, all committed against his daughter, K.W. CP 1-2. Whiteman pleaded guilty to these charges. CP 6-32. The court sentenced Whiteman to 130 months total confinement, but suspended execution of all but 12 months by imposing a Special Sex Offender Sentencing Alternative (SSOSA). CP 37-38. As part of his treatment rules, Whiteman agreed not to use the Internet for any purpose until written boundaries are provided, not to engage in the use of pornography, and not to have any contact with his victims. CP 51.

In 2013, the State filed a notice alleging four violations of the SSOSA: (1) failing to comply with treatment by viewing pornography on "9/2/13";<sup>1</sup> (2) failing to comply with treatment by using his wife's computer that did not have Covenant Eyes on a daily basis as disclosed to his community corrections officer (CCO) on 9/5/13; (3) failing to comply with treatment by using his computer without Covenant Eyes between August 2012 and May 2013; and (4) failing to comply with treatment by going to his daughter's workplace on 8/15/13.<sup>2</sup> CP 50.

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<sup>1</sup> The first violation actually occurred on August 2, not September 2. CP 51, 68, 109.

<sup>2</sup> This allegation involved C., another daughter who was not a charged victim. CP 52. Whiteman admitted in treatment that he had molested C. CP 52. All three of Whiteman's daughters were now of legal age. CP 110.

For the first violation, the CCO alleged in the written notice that Whiteman's wife walked in on Whiteman masturbating to a father-daughter themed pornography site on a computer, whereupon he quickly deleted the site. CP 51-52. Whiteman did not make any calls to his treatment provider or support people until after his wife called treatment. CP 51. He told his CCO that this was the first time he had seen pornography and that he thought the "actor daughter" was not a minor because she had a tattoo. CP 51. In further follow up with the CCO, Whiteman admitted he accessed his wife's computer 12-14 times to check her Facebook points. CP 52.

On August 27, 2013, Mrs. Whiteman called the CCO to express her belief that her husband was accessing soft porn through their Netflix account. CP 52. She further alleged her husband was on her computer daily rather than the 12-14 times reported by him. CP 52. He did not have Covenant Eyes on his own computer until May 2013. CP 54. In addition, Mrs. Whiteman maintained that her husband had gone to stepdaughter C.'s place of employment, a Jack in the Box restaurant. CP 52. C.

Whiteman agreed to release his wife's computer to the Department of Corrections (DOC). CP 53. He admitted going to the father-daughter pornography site and masturbating to it. CP 53. He maintained he deleted the phrase "incest" when his wife walked in on him. CP 53-54. He said

he had been on two adult porn sites. CP 54. He thought the Netflix account number was stolen and someone else was using it. CP 54. He admitted using his wife's computer 12-14 times without treatment permission. CP 53. He later admitted to using his wife's computer on a daily basis against treatment rules, but did so only to check her Facebook Bingo game points. CP 53, 86. He denied making contact with C. at the Jack in the Box. CP 53, 54.

Treatment provider Bellevue Counseling Services (BCS) was concerned that Whiteman sought sexual gratification from the daughter-father themed porn site without using his intervention boundaries and tools. CP 54, 68-69. BCS was still willing to provide treatment, describing Whiteman's progress as "slow." CP 69.

The CCO stated in the notice of violation that 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.

Whiteman, through defense counsel, responded in a memorandum by admitting the first two violations and denying the last two. CP 85-86. The defense noted Whiteman had made progress in treatment and there were no prior violations. CP 84. Rodney Jong, his BCS counselor, was still willing to provide treatment with adjustments and more stringent

monitoring. CP 85. Counsel also pointed out that Whiteman was a 58-year-old diabetic, which affected his ability to be alert in group treatment sessions and hindered his ability to find employment. CP 87-88. He had developed a plan to open a computer repair store. CP 88. The defense argued revocation of the SSOSA was inappropriate under the circumstances and requested lesser sanctions for the admitted violations. CP 87.

A hearing on the matter was held on November 4, 2013. RP.<sup>3</sup> Consistent with the memorandum, the defense admitted violations 1 and 2 and denied violations 3 and 4. RP 7. The State informed the court that it was not going forward on violations 3 and 4. RP 7.

Defense counsel asked the court not to revoke the SSOSA for the reasons set forth in the memorandum and requested imposition of sanctions, another year of treatment, and added conditions as the means to ensure future compliance and success in the program. RP 12-14.

The State did not request revocation. RP 11. The State told the court that Whiteman "may have dodged a bullet" and "only he knows whether he's lying to his CCO, his treatment provider or to this court about the extent of his deviancy." RP 11-12. The State suggested adding additional conditions to his suspended sentence. RP 12.

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<sup>3</sup> The verbatim report of proceedings is referenced as follows: RP - 9/4/13.

During the hearing, the court noticed that Whiteman's wife and stepdaughter C. were in the courtroom, indicating they disagreed with the State's position and Whiteman's request. RP 5, 9-10, 17, 20. The court expressed its concern that Whiteman's family support system may have vanished and that his family did not support his continued SSOSA participation. RP 15-16. The court invited the two family members to make a statement. RP 16-17.

Mrs. Whiteman told the court that she had been allowing her husband to live with her but that he would need to leave her house and get out of her life within 30 days because he was not getting healthy, was not making changes, and was not following through. RP 18-19. They were in the process of getting a divorce. RP 19-20.

Mrs. Whiteman and C. did not support Whiteman being released back into treatment. RP 19. C. said Whiteman had too many opportunities already, and that he had not really done anything to better himself. RP 21. Mrs. Whiteman wanted to revoke the SSOSA. RP 19. She did not think her husband would ever be "ready." RP 19. She also stated "there's more things that we've found that you'll hear about from Margaret," the CCO. RP 19.

At the hearing, CCO Margaret Alquist maintained Whiteman's engagement with treatment had deteriorated for a number of months. RP

22. Alquist complained she could not get a search warrant for the computer on which Whiteman had viewed the father-daughter pornography site. RP 23. Permission to search the computer was subsequently obtained, but the computer history was wiped clean and multiple files were blocked. RP 24-25.

CCO Alquist also described discovering a small, notebook-like "Surface" computer purchased by Whitehead in the middle of August 2013. RP 24. According to the CCO, there were a variety of porn sites on it, with one having a "teens" topic. RP 24. She had only a limited ability to look at what was on the computer. RP 24. She was frustrated that Whitehead's computer expertise had prevented her from further discovering what was in the computers. RP 25. The CCO proclaimed "we need to know what's in these computers" because things had been deleted and it was "very clear that things are going on that Mr. Whiteman does not want myself or the court or treatment to know." RP 25-26.

Defense counsel pointed out the CCO was not computer literate and was not qualified to talk about "these types of programs or what may or may not be hidden." RP 26. Counsel reiterated that modified conditions could prevent improper access to computers in the future. RP 26-27. Whiteman had made progress in treatment and an extension of treatment was appropriate to address remaining inadequacies. RP 27-28.

Whiteman himself addressed the court, saying he consented to DOC examination of the computers and admitted he had looked at "fantasy incestuous porn sites." RP 28-29. When the court pointed out he did not call in the first violation until after being discovered by his wife, Whiteman said he had 24 hours to call in but his wife beat him to it. RP 29. He had increased his engagement with the treatment program in response to the incident. RP 29-30. He realized he had an addiction and wanted to move forward in treatment to deal with it. RP 30. He was appreciative of the help his wife had given him. RP 30. He erred in viewing the fantasy site but it was an error that he did not intend to repeat. RP 32. He had plans for work in a computer store, where he would be monitored. RP 31-32.

His wife chimed in, saying Whiteman would not have reported the incident had she not called first. RP 33. She continued: "And that offense happened the first part of August, probably around the 15th. On the 25th he was still -- with his new little Surface, was viewing pornography three days before his polygraph. And the one site, when the tech was there, said it was a teen site. So even though he knew he was in big trouble, he's still accessing these sites. . . . I am fearful that something else is going to happen, and he's going to have another victim." RP 33.

Whiteman responded that the Surface was originally purchased to use at the business to keep business records on. RP 33. He had viewed pornography on it, but then stopped. RP 33. Overall, he was anguished and sorrowful for what he had done but thought he could move forward. RP 33.

The court expressed its belief that the SSOSA was used primarily to hold families together, not to re-victimize them. RP 34. Usually families are in support and create the backup for the treatment program. RP 33. Whitehead, however, had "continued" to violate. RP 33. The court pronounced, "it's my judgment that even now there's some minimization going on in terms of the amount of contact that's happened, the -- the depth of your problem." RP 33-34. The court was concerned "there is no support system there now, at least within the family unit." RP 35.

The court was struck by how "we bend over backwards to assist sex offenders" and sometimes lose sight of the victims. RP 36. According to the court, it was a "rare circumstance where it's an intrafamily offense where the entire family finally comes in and says, Judge, enough is enough." RP 37. The family did not trust him, so the judge did not trust him. RP 37.

The court revoked the SSOSA, finding Whiteman violated the terms and conditions of his suspended sentence as follows: (1) "failed to make reasonable progress in a sexual deviancy program with Bellevue Community Services"; (2) "failure to comply with treatment conditions by admitting to viewing pornography"; and (3) "failure to comply with treatment conditions by using his wife's computer without a monitoring device (admitted)." CP 92. The court ordered Whiteman to serve the remainder of his sentence. CP 93.

The defense filed a motion to reconsider. CP 95-118. Counsel alleged Whiteman's wife unexpectedly turned on her husband in asking for revocation. CP 95. Counsel had spoken with Whiteman and his wife before the hearing and had no inkling she had changed her mind about allowing her husband to come home for some period of time and continue treatment. CP 96. Counsel and client arrived at the hearing knowing the State was not going to request revocation and that BCS was in favor of continuing treatment. CP 96. Changes proposed by the BCS counselor including extending treatment, increased 12-step meetings, more frequent use of polygraphs, no home access to computer, and use of computers at work only when supervised. CP 96. This was Whiteman's first violation in almost five years. CP 96. There was no evidence of a new crime. CP 96.

The defense further argued basic due process requires the defendant to be made aware of the violations of which he is accused. CP 97. At the hearing, there was unexpected testimony as to a second, tablet type "Surface" computer that supposedly showed evidence of visiting porn sites. CP 96. This allegation regarding a second computer was not provided in advance of the hearing, and was "surprise evidence not previously even hinted at by the State's submissions." CP 96.

The defense also described the wife's request for revocation as a surprise. CP 97-98. Had the defense known of the wife's change of heart, a continuance would have been requested to ensure K.W., the victim, could be heard on the matter. CP 98. K.W. did not appear at the hearing due to a prior commitment, but now submitted a declaration that she opposed revocation and would like to see her father continue treatment rather than go to prison. CP 96, 106.

The court denied the motion to reconsider. CP 119-20. This appeal follows. CP121-22, 123-28.

C. ARGUMENT

REVERSAL IS REQUIRED BECAUSE WHITEMAN RECEIVED IMPROPER NOTICE OF THE ALLEGED VIOLATION THAT FORMED A BASIS FOR REVOCATION OF HIS SUSPENDED SENTENCE.

Whiteman was not given proper notice of a violation that formed part of the ultimate basis for revocation. Specifically, Whiteman did not receive written notice that the viewing of pornography on the "Surface" computer would be used against him at the revocation hearing. Reversal of the revocation order and remand for a new hearing is required because the lack of notice violated Whiteman's right to due process. U.S. Const. amend. 14; Wash. Const. art. I, § 3.

The SSOSA statute allows a trial court to suspend a sentence for qualified sexual offenders if the offender is shown to be amenable to treatment. RCW 9.94A.670(2)-(4). The court may later revoke the SSOSA if it is reasonably satisfied the offender violated a condition of the suspended sentence or failed to make satisfactory progress in treatment. RCW 9.94A.670(11); State v. Miller, 159 Wn. App. 911, 917-18, 247 P.3d 457, review denied, 172 Wn.2d 1010 (2011).

A trial court's decision to revoke a SSOSA suspended sentence is reviewed for abuse of discretion, as are rulings on motions for reconsideration. State v. Partee, 141 Wn. App. 355, 361, 170 P.3d 60

(2007); City of Longview v. Wallin, 174 Wn. App. 763, 776, 301 P.3d 45 (2013). A trial court necessarily abuses its discretion by violating a constitutional right. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009) (citing State v. Perez, 137 Wn. App. 97, 105, 151 P.3d 249 (2007)). The claimed denial of a constitutional right, including the right to due process, is an issue of law reviewed de novo. Iniguez, 167 Wn.2d at 280; State v. Simpson, 136 Wn. App. 812, 816, 150 P.3d 1167 (2007).

A hearing on revocation of a SSOSA is not a criminal proceeding, but an offender facing revocation retains basic due process rights. State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999). These due process rights include: (a) written notice of the claimed violations; (b) disclosure to the offender 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)).

Whiteman's due process right to receive written notice of the claimed violations was violated here. "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.

Proper notice must set forth all alleged violations so that a defendant has the opportunity to marshal the facts in his defense. Id. at 684.

Whiteman did not receive prior notice of the allegation that he viewed pornography on the small, tablet-like "Surface" computer. At the revocation hearing, Whiteman's wife told the court "there's more things that we've found that you'll hear about from [the CCO]." RP 19. Sure enough, CCO Alquist alleged a "Surface" computer purchased by Whitehead in the middle of August 2013 contained a variety of porn sites on it, with one having a "teens" topic. RP 24. The CCO felt "we need to know what's in these computers" because things had been deleted and it was "very clear that things are going on that Mr. Whiteman does not want myself or the court or treatment to know." RP 25-26. Mrs. Whiteman further maintained that her husband was still viewing pornography on the Surface computer as of August 25th, three days before his polygraph, "even though he knew he was in big trouble, he's still accessing these sites. . . . I am fearful that something else is going to happen, and he's going to have another victim." RP 33.

The claimed violation regarding the "Surface" computer was significant because it pointed to a deeper deviancy problem and trouble with treatment progress. Instead of considering an isolated viewing of the father-daughter porn site that Whiteman ultimately admitted to, the court

was presented with the more far-reaching allegation that Whiteman accessed pornography on the "Surface" after the earlier incident and did not admit its occurrence to anyone before the revocation hearing.

Again, "[d]ue 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 (emphasis added). In revoking the SSOSA, the court found as one of the violations that Whiteman "failed to make reasonable progress in a sexual deviancy program with Bellevue Community Services." CP 92. That basis for revocation implicates the "Surface" computer allegation for which Whiteman did not receive notice. In revoking the sentence, the court expressed its view "that even now there's some minimization going on in terms of the amount of contact that's happened, the -- the depth of your problem." RP 33-34.

That "minimization" about the "depth" of Whiteman's "problem" speaks to viewing pornography on the "Surface" computer without admitting it to anyone before the revocation hearing. That factual allegation is tied to whether Whiteman failed to make reasonable progress in treatment because it exposes a deeper, ongoing problem with a deviancy that has not been corrected or properly managed by treatment. Whiteman challenges the finding that he failed to make reasonable progress in

treatment because that finding is tainted by the court's improper consideration of evidence involving the "Surface" computer. CP 92. Because Whiteman was denied due process of law regarding notice, the court erred in revoking the suspended sentence and in denying the motion to reconsider when the notice violation was brought to its attention. See Iniguez, 167 Wn.2d at 280 (trial court necessarily abuses its discretion by violating a constitutional right).

A closely related due process requirement arises in the event there is any question that the court relied on the "Surface" incident in support of its finding that Whiteman failed to make reasonable progress in treatment. Due process requires a statement by the court as to the evidence relied upon and the reasons for the revocation. Dahl, 139 Wn.2d at 683. The "written statement" requirement prescribed by Morrissey "helps to insure accurate factfinding with respect to any alleged violation and provides an adequate basis for review to determine if the decision rests on permissible grounds supported by the evidence." Black v. Romano, 471 U.S. 606, 613-14, 105 S. Ct. 2254, 85 L. Ed. 2d 636 (1985). The trial court may satisfy this requirement in its oral ruling, but only so long as the oral ruling is sufficiently detailed to be amenable to judicial review. Dahl, 139 Wn.2d at 689.

Neither the written findings nor the oral ruling spell out what facts the court relied on to find Whiteman failed to make reasonable progress in treatment. RP 38; CP 92. As argued above, the oral remarks indicate the court took the "Surface" pornography into account. But if that remains unclear, then the court violated due process in failing to make an adequate statement of the evidence relied upon for revocation.

The notice error is preserved for review. "A person accused of violating the conditions of sentence has some responsibility in ensuring that his or her rights under Morrissey are protected. The accused must, at a minimum, place the court on notice that due process is being violated by making an appropriate objection." State v. Robinson, 120 Wn. App. 294, 297, 85 P.3d 376 (2004). Defense counsel notified the court of the due process notice problem in the motion for reconsideration. CP 96-97. "The purpose of requiring an objection in general is to apprise the trial court of the claimed error at a time when the court has an opportunity to correct the error." State v. Moen, 129 Wn.2d 535, 547, 919 P.2d 69 (1996). The court had an opportunity to correct the due process error when presented with the motion for reconsideration raising that issue. The court, however, denied the motion to reconsider without addressing how or why Whiteman's due process right to notice was not violated. CP 119-20.

The due process error cannot be deemed harmless where the revocation appears to have been based, at least in part, on a matter implicating a due process violation. Dahl, 139 Wn.2d at 689. The court at no time specified that it would have revoked the SSOSA based on the two admitted violations standing alone, apart from the other violation of failing to make reasonable treatment progress. As argued above, the latter ground for revocation implicates the "Surface" computer evidence for which Whiteman did not receive notice.

And while the court was concerned that Whiteman had "no" family support and that the "entire" family was against him at the revocation hearing (RP 35, 37), it turns out Whiteman did have some family support to maintain his SSOSA. His daughter, the charged victim, opposed revocation. Her declaration was presented as part of the motion for reconsideration. CP 96, 106. The court denied the motion for reconsideration anyway. So again, it is at least unclear whether the court would have revoked the SSOSA in the absence of consideration of the "Surface" computer evidence for which Whiteman did not receive notice.

The remedy for a revocation based on improper notice is reversal of the revocation order and remand for a new hearing preceded by proper notice. Jessup v. U.S. Parole Com'n, 889 F.2d 831, 835 (9th Cir. 1989). Whiteman requests that remedy.

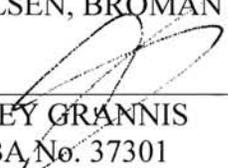
D. CONCLUSION

For the reasons set forth above, Whiteman requests reversal of the revocation order and remand for a new hearing on claimed violations based on proper notice.

DATED this 30<sup>th</sup> day of May 2014

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 71312-4-1
	)	
KENNETH WHITEMAN,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30<sup>TH</sup> DAY OF MAY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

[X] KENNETH WHITEMAN  
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COURT OF APPEALS  
DIVISION ONE  
MAY 30 2014

SIGNED IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF MAY 2014.

x Patrick Mayovsky