

NO. 44471-2-II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MARLOWE MILTON WESTRA, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Ronald Culpepper

No. 06-1-02889-1

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**Brief of Respondent**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to show that the trial court abused its discretion in revoking his SSOSA when defendant repeatedly violated the conditions of his SSOSA by having contact with his granddaughters, failing to make progress in sex offender treatment, and being terminated from treatment?

B. STATEMENT OF THE CASE.

On June 27, 2006, the Pierce County Prosecuting Attorney (State) charged Marlowe Westra (defendant) with two counts of child molestation in the first degree. CP 1-2. Defendant pleaded guilty to both counts on April 3, 2007. CP 4-15, 56-67, 70. On September 21, 2007, the court granted defendant a suspended sentence of eighty nine months to life under the Special Sex Offender Sentencing Alternative (SSOSA). CP 70, 71, 74.

The State filed a petition to revoke defendant's SSOSA for failure to comply with sentencing conditions a total of four times. CP 83-88, 89-94; CP Supp. 168-71, 172-76, 177-85. The State first petitioned for revocation after learning that defendant had attended a wedding where children were present without prior approval from his treatment provider

or CCO. CP Supp. 168-71. The State petitioned for revocation the second and third time after receiving reports from defendant's treatment provider indicating that defendant was not making adequate progress in treatment. CP Supp. 172-76, 177-185. The court ordered the SSOSA be continued three times; each time the court found that defendant "has yet to fully comply with...all of the requirements of conditions of the treatment program." CP Supp. 186-87, 188-89, 190-91.

The State petitioned the court to revoke defendant's SSOSA a fourth time after learning that defendant had contact with his granddaughters, possessed photographs of his granddaughters, and possessed ammunition. CP 83-88, 89-94.

The victims in this case were defendant's six year old twin granddaughters, M.I.R and M.A.R.<sup>1</sup> CP 56-67. The conditions of defendant's SSOSA included: prohibiting defendant from any direct or indirect contact with the victims or minor children; prohibiting defendant from possessing a firearm or ammunition; prohibiting defendant from consuming alcohol; requiring defendant to enter and complete a state approved sexual deviancy treatment; requiring defendant to not change sexual deviancy providers without prior approval from the court; and

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<sup>1</sup> Both victims are minors; for purposes of anonymity the State will refer to them by their initials.

requiring defendant to follow all conditions imposed by the sexual deviancy provider. CP 52-55, 75, 80-82.

The evidence at the revocation hearing showed the following:

Defendant began a sex offender treatment program run by Dr. Daniel Yanisch following his sentencing. CP 81; RP 7.<sup>2</sup> However, after approximately three years of treatment, Dr. Yanisch determined that defendant had not made adequate progress in his treatment and that defendant would likely never understand his offending cycle. RP 7, 10.

In June of 2011, defendant transferred to a sex offender treatment run by Dr. Daniel DeWaelsche. CP 103; RP 7. Dr. DeWaelsche testified that although defendant attended the weekly group meetings and participated in the discussions, he felt that defendant was not being honest and forthcoming about his conduct at home, and that ultimately Dr. DeWaelsche did not believe defendant was "following the rules." RP 7, 10, 15, 17, 24.

During his treatment with Dr. DeWaelsche, defendant brought up the fact that he had a neighbor who had children. RP 11. Dr. DeWaelsche discussed with defendant that he was not to have any contact with the children, including smiling or waving at them. 7RP 11. Dr. DeWaelsche testified that while defendant had no problems understanding that he

should not have contact with the neighbors, he seemed reluctant to do so.

RP 12.

Kimberly Carrillo was defendant's community corrections officer and was assigned to supervise him beginning in March of 2012. RP 59. Carrillo would meet with defendant at least once per month, usually in his home. RP 59. Carrillo testified that defendant seemed "knowingly inconsistent" in the course of their meetings, and would often falter and change his story when Carrillo asked him questions. RP 60.

In June of 2012, Carrillo visited defendant's home and found a bottle of alcohol and a large amount of empty beer containers. RP 60. Defendant first told Carrillo that the bottle of alcohol belonged to him, then later said it belonged to his wife, and that he acquired the beer containers from his neighbors. RP 60.

On August 21, 2012, Carrillo met with defendant and inspected his vehicle. RP 61. Carrillo noticed a photograph of a young female on the dashboard of defendant's car. RP 62. The photograph was propped up so that the driver of the vehicle could have a direct visual of it. RP 62. When questioned, defendant told Carrillo that the photograph was of his granddaughter. RP 62.

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<sup>2</sup> The State will refer to the transcript as 'RP' followed by the page number.

On August 23, 2012, Carrillo searched defendant's vehicle. RP 63. The photograph that was on the dashboard was no longer there, however, Carrillo discovered a plastic bag underneath the driver's seat with photographs of all of defendant's grandchildren. RP 63. The ages of the children in the photographs were around the ages in which defendant molested them. RP 64. Defendant told Carrillo that he did not know what happened to the photograph that was on the dash of the car and had no explanation as to why there were pictures of his granddaughters underneath the driver's seat. RP 63-64.

Following the discovery of the photographs, Carrillo contacted several other community corrections officers and performed a search on defendant's home to check for any other violations of his community custody conditions. RP 64-65. Once inside the residence, the corrections officers immediately noticed a number of children's belongings, such as clothes, toys, school work, and drawings, in the living room and strewn throughout the house. RP 65. Defendant and his wife initially told the corrections officers that they were just storing the items for their daughter, but eventually admitted that their grandchildren do sometimes come to visit. RP 65. Defendant admitted that when his grandchildren come over he is usually away from the house, but that on several occasions would remain in the basement in the house while the kids were present in the home. RP 66. Defendant's wife admitted to corrections officers that she would periodically inform defendant of how the children were doing. RP

66. Carrillo testified that such information is a violation of defendant's community custody conditions, as it is considered third party contact. RP 66. Carrillo also testified that she had made it clear to defendant that such contact was prohibited in the beginning of his supervision, and that defendant had signed a document to that effect. RP 66.

Correction officers found a crossbow and .22 caliber ammunition during the search of defendant's home. RP 69. Possession of weapons or ammunition was a violation of defendant's conditions on community custody, and defendant acknowledged that he was aware that he should not have had the items. RP 68-69.

Corrections officers also discovered a number of Disney VHS tapes in defendant's master bedroom. RP 71. One of the Disney tapes was still in the VCR, which faced the bed in the room. RP 71. Corrections officers discovered the photograph of defendant's granddaughter that was initially on the dash of his vehicle. RP 63. The photograph was found in the bedroom on defendant's nightstand. RP 63.

Defendant was placed in custody and transferred to the Pierce County Jail. RP 71-72. Carrillo and CCO Sally Saxon contacted defendant at the prison a few days later. RP 71-72. Defendant admitted to Carrillo and Saxon that he had visual contact with his granddaughters on several occasions when the children were at his home. RP 72. On one occasion, he was hiding in the garage while the children were playing outside. RP 72. Defendant admitted to looking at them through the window and

commented on their bodies and how they had begun to develop breasts. RP 72-73. He also admitted to having thoughts of touching them while he was watching them. RP 73. Defendant also admitted to listening to them play and laugh while they were at the house. RP 73.

Carrillo testified that this type of contact was considered proximity -or indirect- contact, and that defendant was expected to disclose it immediately. RP 73, 85. Defendant acknowledge that he knew he was not supposed to have any type of contact with his granddaughters. RP 102. Both Carrillo and Saxon felt that defendant was a risk to the community and that he was not making adequate progress in his treatment. RP 81, 103, 104. Both CCOs testified that defendant's SSOSA should be revoked as a result of his repeated violations and dishonesty. RP 78, 104.

Carrillo informed Dr. DeWaelche of the violations she discovered during the search of defendant's home and vehicle. RP 23, 42. Dr. DeWaelche was concerned about defendant's repeated contact with his granddaughters, his failure to report the contact, and the overall lack of honesty on the part of defendant. RP 17, 24-26, 49. Dr. DeWaelche concluded that defendant was living a "covert lifestyle," meaning that he was giving the appearance that he was following treatment while secretly maintaining his old behavior. RP 24.

Dr. DeWaelche consequently terminated defendant from his treatment. RP 27. At the revocation hearing, he testified that he did not believe further progression into treatment would rectify defendant's

behavior, and that his risk of re-offending is high. RP 27-28. Defendant was subsequently accepted into another sex offender treatment program, Tracer Therapy, Inc. RP 80-81, 152.

On January 7, 2013, the court revoked defendant's SSOSA. CP 152-54. The court found that defendant violated the conditions of his community custody when he had contact with his granddaughters, failed to make progress in his treatment, was terminated from treatment, and possessed ammunition. RP 178-80, 183. On February 1, 2013, defendant filed this timely notice of appeal. CP 155.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REVOKING DEFENDANT'S SSOSA WHEN DEFENDANT REPEATEDLY VIOLATED THE CONDITIONS OF HIS SSOSA WHEN HE HAD CONTACT WITH HIS GRANDDAUGHTERS, FAILED TO MAKE ADEQUATE PROGRESS IN SEX OFFENDER TREATMENT, AND WAS TERMINATED FROM TREATMENT.

A superior court may revoke an offender's SSOSA suspended sentence at any time if it is reasonably satisfied that the offender violated a condition of his suspended sentence or 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). Because a revocation of a suspended sentence is not a criminal proceeding, the due process rights afforded at a revocation

hearing are not the same as those afforded at trial. *Dahl*, 139 Wn.2d at 683. Such minimal due process rights entail: (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; (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. *Id.* Revocation of a suspended sentence due to violations rests within the discretion of the trial court and will not be disturbed absent an abuse of discretion. *State v. McCormick*, 166 Wn.2d 689, 213 P.3d 32 (2009). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *State v. Partee*, 141 Wn. App. 355, 361, 170 P.3d 60 (2007).

In the present case, the court found defendant had violated several conditions of his suspended sentence by: (1) having contact with his three minor granddaughters by peering at them through a window and by his presence when they were at his house; (2) failing to report the contact with his granddaughters to either his CCO or treatment provider; (3) failing to make progress in his treatment; (4) being terminated from treatment; and (5) being in possession of .22 caliber ammunition. CP 159-60.

- a. Defendant had adequate notice that any sort of contact with his granddaughters, including indirect contact, was a violation of his suspended sentence.

A person accused of violating conditions of a sentence bears some responsibility for protecting his or her minimal due process rights. *State v. Robinson*, 120 Wn. App. 294, 297, 85 P.3d 376 (2004). At a minimum, the accused must notify the court, through an objection, of an alleged violation of due process. *Id.* An objection is important because revocation hearings, like most other court proceedings, are time consuming and expensive. *State v. Naillieux*, 158 Wn. App. 630, 638, 241 P.3d 1280 (2010). An accused may not sit by and let the revocation hearing proceed, see how things turn out, and then assert lack of notice on appeal. *See State v. Nelson*, 103 Wn.2d 760, 766, 697 P.2d 579 (1985).

Defendant's judgment and sentence stated that "defendant shall not have contact with [his granddaughters] including, *but not limited to*, personal, verbal, telephonic, written or contact through a third party for life." CP 73 (emphasis added). Appendix H of defendant's judgment and sentence stated that defendant shall "have no contact with any minor without prior written authorization from the court, treatment provider, and assigned community corrections officer. Then said contact shall be in the presence of a pre-approved adult supervisor." CP 53. Defendant signed these documents prior to his release. CP 77.

Defendant also had multiple conversations with his treatment provider, Dr. DeWaelsche, in which he was informed time and time again of the importance of not having any contact whatsoever with minor children, and the obligation to report such contact should it occur. RP 11-14, 25-26, 27. Defendant's CCO, officer Carrillo, also testified that she had spoken to defendant in the beginning of his supervision and informed him that contact with his granddaughters is a violation. RP 66. Carrillo also stated that defendant had signed documents acknowledging such requirements. RP 66.

Defendant argues that he had inadequate notice prohibiting him from being in proximity to his granddaughters. Appellant's brief at 7. This argument fails, as defendant not only signed the judgment and sentence in which these conditions were declared, but was also informed multiple times by his treatment provider and CCO of these conditions. RP 11-14, 25-26, 27, 66, 73, 77.

Had defendant reported the initial proximity contact to his CCO and treatment provider immediately after it occurred, as required by other SSOSA conditions, his claim that he lacked notice might be more credible. Defendant's deliberate lack of candor, coupled with the fact that this type of contact occurred more than once, however, indicates that defendant was aware that his conduct was improper and chose not to disclose it.

Finally, defendant himself acknowledged that he knew he was not supposed to have this type contact with his granddaughters when questioned by CCOs Carrillo and Saxon. RP 102.

Defendant was well aware of the conditions on his SSOSA prohibiting him from contacting his granddaughters, and purposely chose to disregard them on multiple occasions. Thus, the trial court's decision to revoke his SSOSA was not based on unreasonable or untenable grounds.

- b. The trial court's decision to revoke defendant's SSOSA based on defendant's lack of progress in treatment and termination from treatment was not unreasonable or based on untenable grounds.

Both of defendant's treatment providers stated that defendant failed to make adequate progress during the course of his treatment. RP 10, 24-28. Defendant's first treatment provider, Dr. Yanisch, reported that after three years of treatment defendant had received the maximum benefit of treatment and would never understand his offending cycle. RP 10. Dr. Yanisch also reported that at this point treatment would only serve as a means to monitor defendant in order to keep the community safe. RP 10.

Defendant's second treatment provider, Dr. DeWaelche, testified that defendant's deceptiveness, lack of honesty, and "covert lifestyle" make him likely to re-offend and posed a risk to the community. RP 24-28. Dr. DeWaelche concluded that further progression in treatment will

not rectify defendant's behavior because defendant "continues to set up situations where he would have the potential to possibly sexually assault a child." RP 27.

At the time of the revocation hearing, defendant had been in treatment for approximately five years and was still unable to recognize his offending cycle or distance himself from his victims. RP 27. Defendant argues that he was not terminated from treatment, but rather a treatment *provider*. Appellant's brief at 10. Defendant goes on to argue that because he had been accepted into a new treatment program, Tracer Therapy, Inc., he could continue treatment, and thus not be in violation of his SSOSA conditions. Appellant's brief at 10.

However, defendant's SSOSA conditions required him to "attend *and complete*" a sexual deviancy program. CP 54 (emphasis added). Given that defendant was already terminated from treatment by two different providers due to his inability to make progress, and his previous providers' judgment that further treatment will ultimately not rectify defendant's behavior, it is highly unlikely that defendant would ever make sufficient progress to complete a treatment program. By being terminated from treatment on two separate occasions for the same reason- failure to make progress in treatment- defendant had violated the condition of his SSOSA.

Furthermore, both of defendant's previous treatment providers stated that defendant posed a risk to the community. RP 7, 24, 26-28. The court had no obligation to continue defendant's SSOSA once it discovered that defendant was deemed unsafe to be in the community. The court did not abuse its discretion in revoking defendant's SSOSA despite the fact that defendant had been accepted into a treatment program after being terminated from two separate treatment programs prior.

The trial court did not rely on unreasonable or untenable grounds in revoking defendant's SSOSA. Defendant had been deemed unsafe to be in the community and had been terminated from two separate treatment programs for failure to make progress, which constituted a violation of his SSOSA.

- c. Defendant's possession of ammunition constituted a violation of his community custody conditions which warranted the revocation of his SSOSA

A court may revoke an offender's SSOSA at any time so long as the court is satisfied that the offender has violated a condition of his suspended sentence. *See e.g., State v. Dahl*, 139 Wn.2d at 683. The court is not required to make a determination whether the condition violated was a "major" or "minor" one, but simply that a violation occurred. The court has the discretion to revoke a SSOSA if defendant violates *any one*

condition of community custody. *See e.g., State v. Dahl*, 139 Wn.2d at 683; *State v. McCormick*, 166 Wn.2d at 706.

Defendant clearly violated a condition of his community custody when he was in possession of ammunition. Defendant even admitted to his CCO that he was aware that he should not have the ammunition. RP 68-69. Because the court was satisfied that defendant violated this condition, the court did not abuse its discretion when it revoked defendant's SSOSA based in part on this violation.

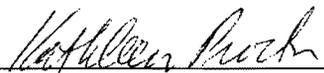
D. CONCLUSION.

The trial court did not abuse its discretion when it revoked defendant's SSOSA. Defendant violated the conditions of his suspended sentence when he had contact with his granddaughters, failed to report that contact, failed to make progress in treatment, was terminated from treatment, and possessed ammunition. Furthermore, defendant was given notice from the court on three prior occasions that he was in violation of the conditions of his suspended sentence, and was given three separate opportunities to correct his behavior. Despite the fact that the court allowed defendant's three prior violations and continued his SSOSA, defendant continued to violate the conditions of his suspended sentence.

The court's finding that defendant violated the conditions of his SSOSA was not based on untenable or unreasonable grounds. For these reasons, the State respectfully requests this Court to affirm the trial court's order revoking defendant's SSOSA.

DATED: November 5, 2013.

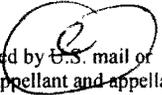
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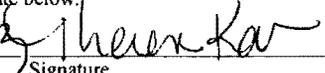
  
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The undersigned certifies that on this day she delivered by  U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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