IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CURTIS MICHAEL MULDROW, Appellant.	No. 38515-5-II UNPUBLISHED OPINION

Worswick, J — Curtis Muldrow appeals the trial court's revocation of his Special Sex Offender Sentencing Alternative (SSOSA) suspended sentence. RCW 9.94A.670. He argues that the trial court erred in admitting hearsay evidence and in failing to suppress evidence. We reverse and remand for a new revocation hearing.

FACTS

On April 8, 2003, Muldrow, a minor at the time, pleaded guilty to two counts of first degree child rape. The trial court sentenced him to 6 months in custody and 125 months suspended so long as he complied with the terms of his SSOSA treatment program. The trial court directed him to avoid contact or communication with anyone under 16 years of age, to not socialize with any women who had minor children in their custody or care, and to abide by geographical restrictions set by the Department of Corrections.

On September 12, 2008, Thurston County Sheriff's Detective Darryl Leischner learned

that Muldrow had been staying in Thurston County with his girlfriend, Erin Staap, who had a young child. He also learned that Staap's sister and her young children lived at the apartment with her. He then interviewed Staap regarding Muldrow's situation. Staap explained that she did not know Muldrow was a sex offender, that she allowed him to spend a few nights at her apartment with minors present, and that she once left her child alone with him for several hours.

Detective Leischner contacted Pamela Bohon, Muldrow's Community Corrections Officer, to tell her what he found regarding Muldrow. Bohon arrested Muldrow later that day and took him to the Pierce County jail. Muldrow had a backpack with him, which the jail refused to accept. Bohon returned to her office with the backpack and searched it. She found a cellular phone inside and searched the phone's electronic contents for photographs of minor children, which she found. Bohon also spoke directly with Staap to discuss Muldrow's contacts with her and with the minor children in her home.

Muldrow appeared before the trial court for a review hearing on September 19 and a revocation hearing on October 10, 2008. Bohon testified as to Muldrow's five alleged SSOSA violations, including: (1) having multiple unauthorized contacts with minors; (2) being in a position of trust or authority over a minor child; (3) having an unauthorized romantic relationship with Staap, who had a minor child; (4) leaving Pierce County without permission; and (5) having unauthorized possession of pictures of minor children on his cellular phone.

Bohon testified that she never gave Muldrow permission to have unsupervised contact with minors, stay at Staap's apartment, leave the county, or have a romantic relationship with Staap. And with regard to the photographs found on Muldrow's cellular phone, Bohon testified

that she examined the phone as part of her inventory search and that sex offenders frequently have unauthorized pictures on their phones. Bohon testified about each picture. The trial court admitted the photographs into evidence, over Muldrow's objection.

Bohon further testified that she received and reviewed Detective Leischner's report which included transcripts from Leischner's interview of Staap[1] and her sister. Bohon stated that her conversation with Staap was very similar to Leischner's interview, as reflected in the transcripts. The trial court admitted Leischner's interview transcripts over defense counsel's hearsay objections. At the end of the hearing, the trial court specifically found Bohon to be a credible witness.

The trial court found that Muldrow committed all five violations by a preponderance of the evidence, revoked his SSOSA, and ordered him to serve the remainder of his sentence in custody. He appeals.

ANALYSIS

Standard of Review

"We review a trial court's decision to revoke a SSOSA suspended sentence for an abuse of discretion." *State v. Partee*, 141 Wn. App. 355, 361, 170 P.3d 60 (2007). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009). A decision based on an error of law is based on an untenable ground and may constitute an abuse of discretion. *See State v. Nieto*, 119 Wn. App. 157, 161, 79 P.3d 473 (2003).

[1] Neither Detective Leischner nor Staap testified at the hearing.

A trial court remains free to revoke an offender's SSOSA whenever it is reasonably satisfied that the offender violated a condition of his suspended sentence. *State v. Dahl*, 139 Wn.2d 678, 683, 990 P.2d 396 (1999). We review de novo a trial court's determination that a warrantless search was valid. *State v. Moore*, 161 Wn.2d 880, 885, 169 P.3d 469 (2007). And we review a trial court's determination on suppression motions as conclusions of law de novo. *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003).

Hearsay Evidence

Muldrow first contends that the trial court violated his due process right to confrontation. He argues that the trial court erroneously admitted hearsay evidence without determining whether good cause existed. We agree.

The revocation of a suspended sentence is not a criminal proceeding. *State ex rel. Woodhouse v. Dore*, 69 Wn.2d 64, 70, 416 P.2d 670 (1966). Accordingly, the due process rights afforded at a revocation hearing are not the same as those afforded at the time of trial. *In re Pers. Restraint of Boone*, 103 Wn.2d 224, 230, 691 P.2d 964 (1984). An offender facing revocation of a suspended sentence has only minimal due process rights. *Dahl*, 139 Wn.2d at 683. A revocation hearing requires minimal due process protections, including "the right to confront and cross-examine witnesses (unless there is good cause for not allowing confrontation)." *Dahl*, 139 Wn.2d at 683. Hearsay evidence can be considered "only if there is good cause to forego live testimony." *Dahl*, 139 Wn.2d at 686. To make a determination that there is good cause to admit hearsay, the trial court must consider the " 'difficulty and expense of procuring witnesses in combination with "demonstrably reliable" or "clearly reliable"

evidence.' " *Dahl*, 139 Wn.2d at 686 (quoting *State v. Nelson*, 103 Wn.2d 760, 765, 697 P.2d 579 (1985)).[2] In balancing these competing interests, many courts have focused on the reliability of the hearsay evidence as the primary evidence of the good cause showing. *See Nelson*, 103 Wn.2d at 765. But we do not read this to mean a good cause showing is not required.

Violations of the minimal due process right to confrontation are subject to a harmless error analysis. *Dahl*, 139 Wn.2d at 688. "In revocation cases, the harm in erroneously admitting hearsay evidence and thus denying the right to confront witnesses is the possibility that the trial court will rely on unverified evidence in revoking a suspended sentence." *Dahl*, 139 Wn.2d at 688. The trial court cannot solely base its revocation on unreliable hearsay. *Dahl*, 139 Wn.2d at 688. Harm exists when revocation relies on unreliable hearsay lacking good cause. *Dahl*, 139 Wn.2d at 689.

The trial court here failed to make a good cause finding.[3] This error was not harmless because all of the evidence offered for the first four alleged violations was hearsay in one form or another. Muldrow was unable to genuinely confront and cross-examine those who provided the evidence against him. Even though the trial court found Bohon to be reliable, that alone does not allow the trial court to avoid making a good cause finding, a required step in its analysis to admit hearsay evidence.

---

[2] In *State v. Abd-Rahmaan*, 154 Wn.2d 280, 291, 111 P.3d 1157 (2005), our Supreme Court held that the United States Supreme Court's ruling in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), does not apply to sentence revocation hearings and that *Dahl* and *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) govern the use of hearsay evidence at such hearings.

[3] The State concedes that the trial court failed to make a good cause finding.

The record does not demonstrate why the State did not call Detective Leischner, Staap, Staap's sister, or Staap's apartment manager to testify; thus, it appears that the trial court failed to consider the State's difficulty or expense of procuring these witnesses, a necessary inquiry. *See Dahl*, 139 Wn.2d at 686. Muldrow's argument prevails.

Because it is likely to arise on remand at Muldrow's new revocation hearing, we affirm his objection to the trial court's admission of the photographs Bohon found on his cellular phone.

Cellular Phone Search

Muldrow contends that the trial court erred in refusing to suppress the photographs Bohon found on Muldrow's cellular phone because the photographs were the fruits of an unlawful search. We disagree.

We apply the standards for parole and probation revocation to SSOSA revocation by analogy.[4] *See State v. Abd-Rahmaan*, 154 Wn.2d 280, 287-88, 111 P.3d 1157 (2005). "Washington courts have recognized an exception to the search warrant requirement to search parolees or probationers and their homes or effects." *State v. Massey*, 81 Wn. App. 198, 200, 913 P.2d 424 (1996). Such warrantless searches, however, must be reasonable. Former RCW 9.94A.195 (1984).[5] A search of a probationer's effects is reasonable when the officer has a "well-

[4] Neither party here disputes this. Muldrow specifically concedes that this same standard applies to him.

[5] Former RCW 9.94A.195 provides in relevant part:

> If an offender violates any condition or requirement of a sentence, a community corrections officer may arrest or cause the arrest of the offender without a warrant, pending a determination by the court. If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, an offender may be required to submit to a search and seizure of the offender's person, residence, automobile, or other personal property.

founded suspicion that a violation has occurred." *Massey*, 81 Wn. App. at 200.

The State counters that Bohon lawfully checked Muldrow's cellular phone for photographs because she had reason to believe that he violated his SSOSA conditions and, thus, could search his belongings under state law. The State cites *State v. Lucas*, 56 Wn. App. 236, 783 P.2d 121 (1989), for this proposition.

At issue is whether the State's well-founded suspicion that any SSOSA violation occurred allowed the State to search Muldrow and all of his possessions, including the phone, or whether the well-founded suspicion must directly correlate to the item searched. Based on former RCW 9.94A.195 and the limited expectation of privacy applicable to parolees and probationers, a well-founded suspicion of violation of any condition of Muldrow's SSOSA sentence allows a broad warrantless search, including items such as a cellular phone.

The trial court did not error when it based its SSOSA revocation decision in part on the photographs, which Bohon lawfully obtained. Thus, Muldrow's argument on this issue fails.

Because it is not clear from the record that the trial court would have revoked Muldrow's SSOSA sentence based solely on his having photographs of minor children on his cellular phone, and because the trial court did not make a good cause finding before hearsay evidence of his

first four alleged violations of his SSOSA conditions, we reverse and remand for a new revocation hearing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

_____
Worswick, J.

We concur:

_____
Armstrong, J.

_____
Penoyar, C.J.