

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 67430-7-1
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
JAMES VICTOR COLLINS,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: September 19, 2011
)	

Lau, J. — Where the State provides a defendant notice regarding a claimed violation of special sex offender sentencing alternative (SSOSA) conditions and describes the evidence supporting the violation, the State does not violate the defendant’s right to due process merely because a witness’s testimony during the revocation hearing reveals an additional fact supporting revocation. Because the State here provided James Collins adequate notice before the revocation hearing to fulfill his constitutional right to due process, we affirm the order revoking his suspended sentence.

FACTS

On March 6, 2006, James Collins pleaded guilty to two counts of first degree child rape. The court imposed a 130-month prison term but suspended all but six months under the SSOSA. The SSOSA conditions required Collins to attend and complete sexual deviancy treatment with DeWaelsche & Associates and to follow all rules set forth by the treatment provider.

Psychotherapist Dr. Daniel DeWaelsche initially evaluated Collins for the SSOSA program in June 2006. Collins began treatment with Dr. DeWaelsche in September 2006. Treatment conditions required Collins to attend weekly therapy groups with other adult male sex offenders, discuss his progress, complete homework assignments, and submit to polygraph examinations.

During his SSOSA treatment, Collins dated Shawna Gibbs for approximately four years. Their relationship ended in June or July 2009. On December 8, 2009, a no-contact order prohibited Collins from having any contact with Gibbs. On December 17, 2009, Gibbs contacted Michael Cheney, Collins's community corrections officer, and informed him that she believed Collins was following her. Gibbs said she and Collins crossed paths several times on her way home from work and she received two phone calls from Collins's motel.

Collins then failed a polygraph examination to determine whether he had contact with Gibbs after the no-contact order. Dr. DeWaelsche contacted Cheney for more information about Gibbs's allegations concerning Collins. He learned that in addition to

contacting Gibbs, Collins had previously photographed and engaged in sexual activity with Gibbs while she slept. Collins failed another polygraph examination to determine those allegations' validity. Dr. DeWaelche later terminated Collins from treatment.

On January 29, 2010, the State filed a petition seeking a hearing to revoke Collins's SSOSA for failure "to comply with rules and conditions of sexual deviancy treatment, resulting in termination from said treatment" To support that allegation, the State filed a motion for SSOSA revocation. In that motion, the State presented the following support for its claim that Collins violated the SSOSA terms:

According to the report from DeWaelche & Associates, Mr. Collins had been stalking his former girlfriend Shawna Gibbs on December 1st, 2009. After the treatment provider learned of this information from the Community Corrections Officer a polygraph was scheduled with Marty Gunderson to determine the merits of the allegations. It was determined by the polygrapher that the defendant was deceptive in his answers relating to the reported incident.

The treatment termination report also outlined an allegation that the defendant had violated SSOSA conditions by taking nude pictures of Shawna Gibbs and having sexual contact with her while she slept. . . .

On January 27, 2010 Bud Killian performed a polygraph and determined the defendant was being deceitful when answering questions relating to the claims made by his former girlfriend Shawna Gibbs.

The motion further states:

Mr. Collins' multiple deceptive polygraph examinations, his behavior of stalking his former girlfriend, his behavior of having sexual contact with his girlfriend while she slept, his behavior of photographing his former girlfriend in the nude while she slept, his possession of a computer generated photograph of five minor children, his non payment of his legal financial obligations, and his termination from DeWaelche & Associates supports revocation in this case.

In addition to the State's motion, Collins received notice regarding his SSOSA violations from Dr. DeWaelche in a letter to Cheney regarding Collins's termination from treatment. Collins's counsel received a copy of that letter. The letter stated

DeWaelsche had terminated treatment after Gibbs's allegations that Collins had sexual contact with her while she slept and attempted deception in two polygraph examinations. Cheney's notice of violation also notified Collins about his SSOSA violations and detailed the allegations that Collins stalked Gibbs and possessed a computer generated photograph of five female minors, including Collins's child rape victim.

At the SSOSA revocation hearing, Dr. DeWaelsche testified that he terminated Collins's treatment because Collins violated his SSOSA conditions and he had concerns about other activities in which Collins might be engaged. Dr. DeWaelsche testified that the particular behavior Collins exhibited may lead to sexually assaultive behavior.

Also at the revocation hearing, Gibbs testified that Collins followed her on several occasions and appeared near her workplace several times. Gibbs further testified that Collins took nude and partially nude photos of her without consent and had nonconsensual sex with her while she slept. Gibbs also described an incident where, despite not being allowed around young children, Collins came to her home while her godchildren were present and adamantly requested a one-year-child to put on a bathing suit. Gibbs also said that Collins videotaped himself, Gibbs, and a third person having sex without Gibbs's permission.¹

Both Cheney and Dr. DeWaelsche testified that Collins's SSOSA should be

¹ The following additional witnesses testified at the revocation hearing: Shawna Gibbs's mother, Shannon Gibbs; Dr. Vincent Gollogy; and James Collins. Shannon Gibbs also testified about the videotape incident.

revoked. After hearing the evidence presented at the SSOSA revocation hearing, the court made an oral ruling revoking Collins's SSOSA status, concluding that Collins had failed to make adequate progress in treatment.

ANALYSIS

Collins argues the State violated his due process rights by failing to inform him about the videotape evidence. The State counters that it was not required to inform Collins about every SSOSA violation independently and that it provided Collins adequate notice before the revocation hearing.

We review alleged due process violations de novo. State v. Simpson, 136 Wn. App. 812, 816, 150 P.3d 1167 (2007). A court may revoke an offender's SSOSA at any time if it is reasonably satisfied that an offender violated a condition of his suspended sentence or failed to make satisfactory progress in treatment. State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999); RCW 9.94A.670(11).

The revocation of a suspended sentence is not a criminal proceeding. Dahl, 139 Wn.2d at 683. An offender facing suspended sentence revocation has only minimal due process rights. Dahl, 139 Wn.2d at 683. Sexual offenders who face SSOSA revocation are entitled to the same minimal due process rights as those afforded during the revocation of probation or parole. Such minimal due process entails:

- (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 (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. “These requirements exist to ensure that the finding of a violation of a term of a suspended sentence will be based upon verified facts.” Dahl, 139 Wn.2d at 683.

In Dahl, the defendant claimed he received inadequate notice about his SSOSA violations and therefore his due process rights were violated. Dahl, 139 Wn.2d 678. Dahl specifically claimed that each SSOSA violation should have been listed in his notice independently, and that he received inadequate notice that the State intended to rely on an “exposure incident” and a “note incident.” Dahl, 139 Wn.2d at 681. Our Supreme Court disagreed, reasoning that the State did not allege each incident was a separate violation of SSOSA, but that Dahl failed to make reasonable progress in treatment and the incidents supported that claim. Dahl, Wn.2d at 684.

Collins argues that the State relied on the evidence that Collins videotaped himself, Gibbs, and a third person having sex without Gibbs’ permission and that the State’s failure to inform Collins about that evidence violated SSOSA revocation notice requirements. But Dahl offers no support for this argument.

Here, the State notified Collins it sought to revoke his SSOSA status because he failed to “comply with rules and conditions of sexual deviancy treatment, resulting in termination from said treatment” The State’s motion to revoke described several incidents reported by Shawna Gibbs. Collins also received notice through Dr. DeWaelsche’s letter describing his reasons for terminating treatment, and Cheney’s letter recommending SSOSA revocation. Just as in Dahl, it was unnecessary for the State to list every SSOSA violation Collins committed.

After hearing testimony from Shawna Gibbs, Shawna's mother Shannon Gibbs, Dr. DeWaelche, Michael Cheney, Dr. Vincent Gollogly, and Collins, and assessing these witnesses' credibility, the court terminated Collins's SSOSA for "failing to make adequate progress in treatment." Report of Proceedings (RP) (Apr. 12, 2010) at 183. Collins's counsel cross-examined each witness, including Shawna Gibbs, and asked Gibbs about the videotape. The court had the opportunity to and did in fact make credibility determinations. This process satisfied the purpose of the due process requirements for a SSOSA revocation, which require that "the finding of a violation of a term of a suspended sentence will be based upon verified facts." Dahl, 139 Wn.2d at 683.

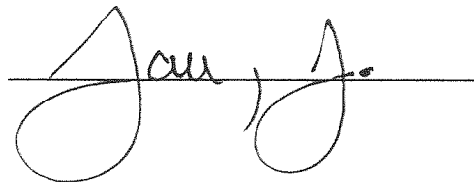
Even if we assumed error occurred, the error was harmless. We apply a harmless error analysis to determine what impact the error had on the validity of the revocation proceeding. See Dahl, 139 Wn.2d at 688 (applying harmless error analysis to violation of a defendant's minimal due process right to confrontation). The videotape was just one of the many incidents the trial court relied on in making its ruling. The court also cited Collins's failure to admit his offenses to Shawna and Shannon Gibbs, attempts to contact Shawna after a protective order was entered, sex with Shawna during her sleep, Collins's termination from treatment, and the court's determination that the State's witnesses were credible, while Collins was not credible. Due to this overwhelming evidence, much of which was specifically disclosed to Collins before the hearing, any error was harmless.

In his statement of additional grounds, Collins requests a new court proceeding

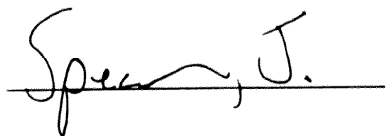
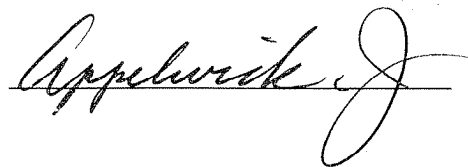
to introduce new evidence. But he cites no reason why this evidence was unavailable at his revocation hearing. He also argues his judgment and sentence does not reflect his plea agreement, saying he made no agreement to “life [imprisonment].” The order revoking the SSOSA sentences Collins to 130 months’ imprisonment and a life term of community custody. But his guilty plea specifically states the possibility of life imprisonment, and therefore, this argument has no merit.

CONCLUSION

Our review of the record demonstrates the State provided Collins adequate notice about the facts and evidence supporting revocation to meet Collins’s due process rights as described in Dahl. His additional arguments are also without merit. Accordingly, we affirm the court’s order revoking Collins’ suspended sentence.

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WE CONCUR:

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