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COUNTY OF PIERCE
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No. 35736-4-II
STATE OF WASHINGTON
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THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DERRICK BOYD,

Appellant.

COURT OF APPEALS
DIVISION TWO
2014 AUG 20 10:45 AM

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

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Because of the liberty interest at stake in a proceeding to revoke a Special Sex Offender Sentencing Alternative (SSOSA) the Fourteenth Amendment requires application of at least the minimal due process protections set forth in Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). Derrick Boyd contends that regardless of what other procedures apply, due process requires the decision to revoke must be based on at least a preponderance of the evidence rather than the lesser “reasonable belief” standard of proof employed by the trial court. Additionally, Mr. Boyd asserts he did not receive sufficient notice of the allegations against him. Thus Mr. Boyd contends the trial court’s revocation decision deprived him of due process and must be reversed.

B. ASSIGNMENT OF ERROR

The trial court’s decision revoking Mr. Boyd’s SSOSA deprived him of due process.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. The United State’s Supreme Court has held that the due process requirements of Morrissey must be afforded at parole and probation revocation hearings. The ultimate requirement of

Morrissey, that a revocation decision be based upon verified facts, requires that the determination be made upon a preponderance of the evidence. Did the court deprive Mr. Boyd of due process where it based its revocation decision upon a “reasonable belief” that the violations had occurred?

2. The notice requirement of Morrissey requires the state provide notice of the specific condition which it alleges has been violated as well as notice of the facts which support the allegation. Where the trial court found Mr. Boyd had violated a condition of his SSOSA which the State had not alleged Mr. Boyd had violated, did the court deprive Mr. Boyd of Due Process.

D. STATEMENT OF THE CASE

In September 2004, following his guilty plea to two counts of first degree child molestation and one count of third degree assault of a child, Derrick Boyd received a SSOSA sentence. CP 37-49. Specifically, the court imposed concurrent sentences of 131 months for the molestation counts and 6 months for the assault count, then suspended all but 46 days on condition that Mr. Boyd successfully complete the SSOSA and comply with the supervision conditions imposed by the Department of Corrections (DOC). Id.

In November 2006, the trial court conducted a hearing on the State's motion to revoke the SSOSA. The State alleged Mr. Boyd had violated the conditions of his SSOSA by using alcohol and having contact with minors in violation of the conditions imposed by DOC. CP 121-22.

Mr. Boyd's Community Corrections Officer, Sherry Aalborg, testified that in September 2006, Mr. Boyd acknowledged he had a relationship in June of that year with a woman who had children. 11/30/06 RP 27. Mr. Boyd told Ms. Aalborg that he had never had direct contact with the woman's children, and that at the direction of his treatment provider he promptly terminated the relationship. Id. Ms. Aalborg contended that even such indirect contact constituted "contact" for purposes of the conditions of Mr. Boyd's sentence, as set forth in a supervision contract signed by Mr. Boyd. Id. at 29. Ms. Aalborg also testified Mr. Boyd was required to first seek permission before entering any romantic relationship. Id. at 32.

During that same September interview, Mr. Boyd told Ms. Aalborg that he had been around people while they were drinking alcohol. 11/30/06 RP 27. Despite the absence of any proof that Mr. Boyd had actually used alcohol, Ms. Aalborg contended this

constituted a violation of the condition of his SSOSA that he not use alcohol.

Dr. Vincent Gollogly, Mr. Boyd's treatment provider, testified he was satisfied with Mr. Boyd's involvement and progress in treatment. 11/30/06 RP 65. Dr. Gollogly testified that in June 2006, during a group therapy session, Mr. Boyd disclosed that he had recently begun a relationship with a woman with children. Id. at 67. Mr. Boyd relayed to Dr. Gollogly that he had known the woman for a long time and had recently begun seeing her romantically, about three times. Id. at 78. Mr. Boyd told Dr. Gollogly he was aware the woman had children, and had been at her house one time when the children were present in the home; however, Mr. Boyd did not see the children. Id. at 80. Dr. Gollogly testified that Mr. Boyd complied with his instruction that Mr. Boyd terminate the relationship.

The trial court revoked Mr. Boyd's SSOSA. CP 127-28. The court found that Mr. Boyd had not violated the alcohol condition. CP 132. However, the court concluded:

There is a reasonable belief that the defendant violated the conditions of his SSOSA sentence by having proximity contact with minor children on several occasions.

[]There is a reasonable belief that the defendant violated the conditions of his SSOSA sentence by failing to request permission from both CCO Aalborg and **his** [sic] treatment provider to enter into a relationship with a particular woman who had three children.

Id.

E. ARGUMENT

THE TRIAL COURT'S REVOCATION DECISION
DEPRIVED MR. BOYD OF DUE PROCESS

1. The revocation of a SSOSA must comport with the Fourteenth Amendment Due Process Clause. The United States Supreme Court has held that before a court can revoke an individual's parole the court or administrative agency must provide minimal due process protections. Morrissey, 408 U.S. at 482-84.

The process due entails:

- (a) written notice of the claimed violations or parole;
- (b) disclosure to the parolee of evidence against him;
- (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body . . . ; and (f) a written statement by the factfinder as to the evidence relied upon and the reasons for revoking parole.

Id. at 488-89. These minimum requirements serve to "assure that the finding of a parole violation will be based on verified facts and

that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior." Id. at 484.

While Morrissey concerned the procedures for revoking parole, the holding has also been applied to probation hearings as well. See e.g., Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). The Supreme Court has expressly found these requirements apply to the revocation of a SSOSA. State v. Dahl, 139 Wn.2d 678, 990 P.2d 396 (1999).

2. Mr. Boyd was deprived due process because the trial court based its decision to revoke his SSOSA on less than a preponderance of the evidence. In the end, the goal Morrissey seeks to achieve by requiring some degree of due process is to "assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior." 408 U.S. at 484. If due process is concerned with insuring an accurate knowledge of the facts, it must require some degree of proof which can establish with a significant degree of confidence that the allegation is more likely true than false.

“Verified” means “1: authenticated by affidavit . . . 2: substantiated by competent proof.” Webster’s Third International Dictionary, 2543 (1993). “Verify” means:

1a: to confirm or substantiate in law by oath or proof .
. . . **2:** to prove to be true : establish the truth of :
conclusively demonstrate by presentation of facts or
by sound reasoning or argument

Id. If a fact is not more likely true than false it cannot be said to be verified. Thus only if an allegation is proven by at least a preponderance of the evidence is it verified.

Admittedly, cases addressing SSOSA revocations have parroted the statement that that the court be “reasonably satisfied” that the violations justifying revocation occurred. Dahl, 139 Wn.2d at 683 (citing State v. Badger, 64 Wn.App. 904, 908-09, 827 P.2d 318 (1992)). The cited portion of Badger does not discuss the burden of proof in light of Morrissey; instead Badger simply cites to a pre-SRA case, State v. Kuhn, 81 Wn.2d 648, 650, 503 P.2d 1061 (1972). Kuhn, decided the same year as Morrissey, does not address that seminal case, and instead merely cites to State v. Shannon, 60 Wn.2d 883, 889, 376 P.2d 646 (1962). Shannon in turn merely cites to a statute pertaining to probation violations in indeterminate sentences, which does not specify a standard of

proof, and an opinion from the South Dakota Supreme Court.

Shannon, 60 Wn.2d at 889 (citing RCW 9.95.220; State v. Elder, 95 N.W.2d 592 (S.D. 1959)).

To be certain there is no statute that specifies the “reasonable belief” standard is to be applied to SSOSA revocations. In fact, RCW 9.94A.670(10), pertaining to revocation, is silent as to the standard of proof.¹ But in the context of Drug Offender Sentence Alternatives (DOSA) revocations, courts, applying Morrissey, have concluded due process requires a revocation be based upon a preponderance of the evidence standard regardless of whether the DOSA is revoked while the offender is in the community or in custody. In re the Personal Restraint Petition of McNeal, 99 Wn.App. 617, 628, 994 P.2d 890 (2000) (citing Morrissey, 408 U.S. at 484); In re the Personal Restraint Petition of McKay, 127 Wn.App. 165, 169-70, 110 P.3d 856 (2005). The community based portion of a DOSA, as with a SSOSA, is community custody. Compare RCW 9.94A.660(6)(a) (in imposing

¹ There is no logical basis to conclude that by its silence the Legislature intended courts to employ a lesser standard of proof in one community custody revocation context. Indeed, rather than simply implying a lower standard which appears nowhere else in the SRA, it would be more reasonable to conclude the legislature’s silence indicates a desire to eliminate the burden of proof altogether. Of course that would plainly violate the dictates of Morrissey. Instead, it is more logical to infer from its silence that the Legislature intended to apply the same standard that applies in every other violation proceeding.

DOSA, court shall impose a “term of community custody equal to one-half of the midpoint of the standard range”) and RCW 9.94.670(4)(b) (in imposing SSOSA, “the court shall place the offender on community custody for the length of the suspended sentence”). Under either sentence alternative, a defendant faces a return to prison to serve a substantial sentence; in Mr. Boyd’s case it is 131 months.

While the assessment of what process is due varies from one scenario to the next, Morrissey, 408 U.S. at 481, due process cannot be so malleable a doctrine as to permit the revocation of community custody in one case to be based on a substantially lower standard of proof than in another merely because of the name attached to the sentence. Indeed, for community placement or community custody violations resulting in modification of the sentence the violation must be proved by a preponderance of the evidence. RCW 9.94A.634(3)(c).²

² It cannot be argued that community custody violations need not satisfy the higher standard of proof because unlike community placement which is the functional equivalent of probation imposed by the court, community custody is the equivalent of parole, and thus the supervision and in turn findings of violations are for DOC alone to make through administrative proceedings by a lesser standard of proof. First, community custody violations may result in sentence modifications by the court pursuant to RCW 9.94A.634 which expressly requires the preponderance standard and thus are not purely administrative hearings. Second, even in administrative hearings, DOC policy requires use of the preponderance standard for community custody hearings. WAC 137-104-

RCW 9.94A.737 permits the Department of Corrections to impose up to 60 days for a violation of community custody based upon the process due in prison disciplinary hearings. While in the prison-disciplinary context due process permits finding of a violation based upon "some evidence," Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), DOC policy expressly requires community custody violation hearings employ the preponderance of the evidence standard. WAC 137-104-050(14).³

Violation or revocation hearings for sex offenders sentenced to indeterminate sentences under RCW 9.94A.712 who have been released to community custody likewise require findings based on a preponderance of the evidence. RCW 9.94A.713 incorporates the provisions of RCW 9.95.425 through RCW 9.95.440 (pertaining to probation in indeterminate sentences). RCW 9.95.435, in turn, incorporates the provisions of RCW 9.94.A.737 and its directive that DOC develop policies for revocation hearings. And as

050(14). Third even though the community-based portion of a SSOSA is community custody, only the court, and not DOC, has authority to revoke it. Compare, RCW 9.94A.670(10) (permitting court to revoke SSOSA) RCW 9.94A.737(2)(a) (limiting DOC sanction to 60 days confinement).

³ Similarly, federal law requires parole revocations, under prior federal sentencing law, and revocations or violations of supervised release, under the present sentencing scheme, to be proved by a preponderance of the evidence. United States v. Goad, 44 F.3d 580, 585 (7th Cir, 1995); Ellis v. D.C., 84 F.3f 1413, 1423 (D.C. 1995).

discussed, DOC promulgated WAC 137-104-050 which requires use of the preponderance standard.

There can be no logical basis for a distinction that requires every other violation hearing, even those conducted administratively by DOC for mere violations, to employ a higher standard of review than that employed in the context of SSOSA revocations conducted by the trial court. As in each of the above contexts, the requirement that the decision be based upon verified facts requires a SSOSA revocation be based on a preponderance of the evidence.

Those cases applying the “reasonably-satisfied” standard did so without the benefit of any analysis of the burden of proof required by Morrissey. They did so despite the fact that in every other context, revocation and violation hearings utilize a preponderance standard. At the end of the day there can be no basis to employ a lesser standard of proof for revocation of community custody in a SSOSA than would apply to revocation of community custody in every other scenario.

Due process required the court find the alleged violations in Mr. Boyd’s case were proved by a preponderance of the evidence and not merely that the court reasonably believed they may have

occurred. The revocation of Mr. Boyd's SSOSA denied him due process.

3. Mr. Boyd was deprived due process by the State's failure to provide sufficient notice of the alleged violations. The first element of due process announced in Morrissey is the provision of "written notice of the claimed violations" to the defendant. 408 U.S. at 489. The Court stated "[t]he notice should state what parole violations have been alleged." Id. at 487. "Part of the function of notice is to give the charged party a chance to marshal the facts in his defense and to clarify what the charges are." Wolff, 418 U.S. at 564.

Here, the State's petition to revoke Mr. Boyd's SSOSA alleged only that Mr. Boyd had violated his sentence by:

- 1) Having a minor contact on or about 7/13/06; and
- 2) Using alcohol on or about 9/6/06 . . .

CP 122. Nowhere in its petition did the state allege Mr. Boyd had failed to obtain permission to begin a romantic relationship.

Ms. Aalborg filed a Notice of Violation which provided:

VIOLATIONS SPECIFIED

The above named offender has violated conditions of supervision by:

1. Having contact with minors on multiple occasions between 6/2/06 and on or about 7/13/06; and

2. Possessing and/or consuming mood altering substances on or about 9/2/06.

CP 126. Within the portion of her violation report setting forth the facts supporting “Violation 1,” Ms. Aalborg alleged Mr. Boyd had failed to obtain her permission prior to entering a romantic relationship. CP 117. However, that was never alleged to constitute a separate violation.

Despite the absence of legal notice of such an allegation, the court found

There is a reasonable belief that the defendant violated the conditions of his SSOSA sentence by having proximity contact with minor children on several occasions.

There is a reasonable belief that the defendant violated the conditions of his SSOSA sentence by failing to request permission from both CCO Aalborg and **his** treatment provider to enter into a relationship with a particular woman who had three children.

[Bold in original] CP 132.

Morrissey clearly delineates between the requirements of factual disclosure and notice of the alleged violations 408 U.S. 471, 488-89. Due process includes: “(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him” Id. That due process requires both notice of the legal charges separate from disclosure of the evidence is clear from

an examination of cases addressing the due process parameters of other types of proceedings, as well as the purpose served by notice in revocation cases. In the setting of prison disciplinary hearings, where only the barest of due process is required, a prisoner is nonetheless entitled to "notice which informs him of the charges and enables him to marshal the facts and prepare a defense."

Wolff, 418 U.S. at 564.

To be sufficiently helpful to the defense, notice of the charges actually should contain two different types of information. First, the parolee or probationer should be apprised of the exact probation or parole conditions allegedly violated . . . Second, the alleged violator should receive notice of the basic facts supporting the claimed infraction.

N. Cohen and J. Gobert, The Law of Probation and Parole, 553 (1983). The notice provided in this case did not provide the first of these.

Nothing in either the State's petition nor DOC's notice of violation alerted Mr. Boyd of the need to defend against an allegation that he had violated his SSOSA by failing to obtain his CCO's permission before entering into a romantic relationship. While Mr. Boyd was provided materials which contained the factual assertions, he had no reason to anticipate the need to defend against these factual assertions as distinct violations of his SSOSA.

The failure to provide this legal notice deprived Mr. Boyd of due process.

4. The Court must reverse the trial court's decision. The evidence presented at the hearing was not so overwhelming as to necessarily lead to revocation under the correct standard of proof. Ms. Aalborg opined that Mr. Boyd's violation of the conditions of his sentence demonstrated he had not progressed sufficiently to be safe in the community. 11/30/07 RP 35. Of course the question was not whether Mr. Boyd should be freed from the requirements of the SSOSA, but rather whether he should be permitted to continue with treatment towards the goal of becoming sufficiently safe in the community. On this more relevant point, Dr. Gollogly plainly testified Mr. Boyd was appropriately progressing in treatment. 11/30/06 RP 65, 74.

Importantly, nothing in the court's oral or written findings suggests that the court found Dr. Gollogly's testimony and opinion lack credibility or was unpersuasive. Indeed they are wholly silent on this point. Instead, rather than resolve the conflict in the opinions of the Ms. Aalborg and Dr. Gollogly, the court was able to reach the result it did merely by employing the "reasonably satisfied" standard of proof. Such a low standard of proof did not

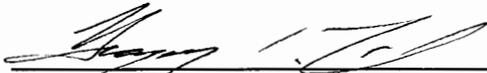
require the court to determine which opinion was more probably correct; in fact the lower standard of proof permitted the court to rely on an opinion even if it was more probably incorrect.

In light of the conflict in the evidence, never resolved by the trial court, it cannot be said that the court would have reached the same result had it employed the correct standard of proof.

F. CONCLUSION

For the reasons above, this Court must reverse the trial court's order and reinstate Mr. Boyd's SSOSA.

Respectfully submitted this 22nd day of August, 2007.



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