

65038-6

65038-6

NO. 65038-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOSE MANUEL PARDO,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE STEVEN C. GONZÁLEZ

BRIEF OF RESPONDENT

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A. ISSUES

1. The minimal due process needed to revoke a Special Sex Offender Sentencing Alternative (SSOSA) requires notice of the alleged violations and the evidence the State will rely upon. Pardo was provided detailed violation reports from the Department of Corrections in November of 2009 outlining the allegations and evidence relied upon to revoke his SSOSA. Did Pardo have sufficient notice of the evidence and allegations when his SSOSA was revoked on February 11, 2010?

2. Due process requires notice of the conditions of a sentence so an offender knows what conduct is prohibited. The trial court granted Pardo a SSOSA sentence on January 4, 2008. Pardo's Community Corrections Officer reviewed the conditions of Pardo's sentence contained in Appendix H of the judgment and sentence with him prior to his release from jail. The court erroneously did not file a copy of the Appendix H conditions of sentence at the sentencing, but discovered and corrected the error on August 22, 2008. Did Pardo have sufficient notice of the conditions of his sentence for the violations that occurred after August 22, 2008?

3. The Washington Supreme Court has held that due process requires that the trial court be "reasonably satisfied" that violations occurred before revoking a SSOSA. The trial court applied the "reasonably satisfied" standard. Did the trial court properly revoke Pardo's SSOSA?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Jose Manuel Pardo, was charged with rape of a child in the second degree and communication with a minor for immoral purposes on December 15, 2006. CP 1-2. The State alleged that Pardo had digitally penetrated the vagina of a twelve-year-old girl, and fondled the breasts and buttocks of a fifteen-year-old girl. CP 3-5. Pardo pleaded guilty to one count of rape of a child in the second degree. CP 17. The court sentenced Pardo on January 4, 2006 and granted a Special Sex Offender Sentencing Alternative (SSOSA). CP 34-42. The trial court revoked the SSOSA on February 11, 2010 after a series of hearings. CP 51-52.

2. SUBSTANTIVE FACTS

On June 26, 2006, twelve-year-old R.E. stayed at the apartment Pardo shared with his wife. R.E. was sleeping on the couch wearing shorts. CP 3-4. At approximately 3:00 a.m., R.E. awoke to find Pardo with his hand up the leg of her shorts and penetrating her vagina with his finger. CP 3-4. Pardo's wife entered the room and asked what he was doing. CP 3-4. Pardo removed his hand and placed a blanket over R.E. Pardo and his wife argued. CP 3-4. R.E. stayed awake until a relative came over to pick her up. CP 3-4.

In July of 2006, fifteen-year-old L.W. was visiting Pardo's apartment. CP 3-4. Pardo's wife went to work and Pardo and L.W. watched a movie. CP 3-4. After the movie ended Pardo grabbed L.W.'s breast and buttocks. CP 3-4. L.W. pulled away and asked what Pardo was doing. Pardo replied that he was "just playing little cousin." CP 3-4.

Pardo pleaded guilty to one count of rape of a child in the second degree. CP 17-33. The court imposed sentence on January 4, 2008. CP 34-42. The State recommended a standard range sentence and did not recommend a SSOSA. 1/4/08 RP 2. Pardo proposed a SSOSA with conditions outlined by his sexual

deviancy evaluator, Michael Comte. 1/4/08 RP 9-12. The court followed Pardo's recommendation and imposed a SSOSA with "all the other requirements of a SSOSA sentence." 1/4/08 RP 14. Pardo was released from jail on July 10, 2008. 2/5/10 RP 62. His Community Corrections Officer, Christopher Duran, reviewed the conditions of his sentence including the Appendix H to the judgment before he was released from jail. 2/5/10 RP 68.

On August 22, 2008, a hearing was held to address violations of Pardo's sentence from a Department of Corrections (DOC) report dated August 15, 2008.¹ During that hearing, the prosecutor brought to the court's attention that there was no Appendix H in the court file. 8/22/08 RP 7. The Appendix H sets forth the community custody conditions for the SSOSA sentence. 8/22/08 RP 7. Pardo's CCO brought a copy of the Appendix H to provide to the court, and the judge signed and filed the Appendix H. CP 45-46. The court noted he was "baffled by why it wasn't filed when the judgment was filed." 8/22/08 RP 10. Pardo did not object

¹ The DOC violation report alleged that Pardo had committed malicious mischief, provided false information to the police, and provided false information to his CCO. 8/22/08 RP 3. The State did not rely on these allegations when Pardo's SSOSA was revoked later in 2010 because the criminal charges stemming from the incident had not been resolved. 8/27/10 RP 4.

when the court signed and filed the Appendix H, and stated "[s]o if the court is inclined to enter Appendix H, and we'd certainly defer to the court in terms of that . . ." 8/22/08 RP 9. When the court specifically asked whether the defense wished to be heard further on whether the Appendix H should be made part of the judgment and sentence, Pardo's attorney replied, "No, your Honor, not except in regards to the language we previously spoke of [exempting his own children from the prohibition from contact with minors]." 8/22/08 RP 10.

On November 13, 2009, Pardo's CCO issued a notice of violation outlining six allegations. Those allegations were:

1. Failing to comply with sexual deviancy treatment guidelines by entering into a sexual relationship without therapist or CCO approval on or before 10/30/09.
2. Failing to comply with sexual deviancy treatment guidelines by providing false/deceptive information to treatment therapist on or before 11/2/09.
3. Failing to comply with sexual deviancy treatment guidelines by entering into a relationship where minor children were involved without therapist approval on or before 10/30/09.
4. Failing to reside nightly at DOC approved residence as directed since on or about 11/09/09.
5. Failing to attend sexual deviancy treatment group as directed on 11/10/09.
6. Failing to report to CCO as directed on 11/10/09 and 11/13/09.

Supp. CP ____ (Sub No. 124, violation report dated 11/13/09, p. 79-83)². The report went on to describe the evidence to support the allegations. On October 30, 2009, Pardo took a polygraph test as required by his SSOSA. Id. Pardo did not show deception on the polygraph, but admitted he was having a sexual relationship with an adult female. Id. The CCO was contacted by Pardo's treatment provider, Jeanglee Tracer, who reported that Pardo was in violation of his treatment rules by failing to notify her about the relationship, and because Pardo's new girlfriend had a child that was around the age of Pardo's victim. Id. Pardo was required to sign into his treatment sessions stating he was not involved in a sexual relationship. Id. Tracer instructed Pardo to return the following day to participate in a Tuesday group session and report to his CCO. Id. Pardo failed to attend the group therapy session as required, and failed to report to his CCO. Id. The CCO called Pardo's father, where Pardo was supposed to reside. Pardo's

² This notice of violation, along with a notice of violation dated 25th, were not initially filed with the court. However, the record clearly shows the court and the defense had copies of the reports (see below). At the end of the revocation process, the State asked to file all of the documentation including the violation reports dated November 13 and 25. Pardo asked for an opportunity to make redactions to the documents before they were filed. 2/11/10 RP 49. That did not occur until March 8, 2011, after Pardo's opening brief was filed. On March 8, 2011, the trial court permitted the documents to be filed to supplement the record pursuant to RAP 7.2(b).

father told the CCO that Pardo had not resided there since November 9, 2009. Id. When Tracer learned that Pardo was not residing at an approved residence as he was required to, she terminated Pardo from treatment. Id.

An annual review hearing was held on November 17, 2009, and Pardo failed to appear despite having had notice. 11/17/09 RP 2. The court issued a bench warrant for Pardo's arrest. 11/17/09 RP 3. The prosecutor provided the court and Pardo's attorney a copy of all of the notice of violations and special reports from DOC. 11/17/09 RP 3. Pardo appeared for the hearing shortly after the warrant was issued. 12/3/09 RP 2.

On November 25, 2009, Pardo's CCO submitted a supplemental notice of violation outlining three additional allegations:

7. Having unapproved contact with minor children since on or about 4/1/09.
8. Failing to reside at a DOC approved residence nightly since 4/1/09.
9. Failing to comply with sex offender registration guidelines by failing to report a change of address to King County Sheriff's Office since on or about 4/1/09.

Supp. CP ____ (Sub No. 124, violation report dated 11/13/09, p. 83-86). The violation report summarized the evidence to support

the allegations. Pardo's CCO spoke to a Debra Alley. Alley lived next door to Pardo's wife in Kent. Alley reported that Pardo had been residing with his wife since April 2009. Id. Pardo's therapist and CCO had not approved this change of address. His only approved address was in Tukwila with his father. Furthermore, Pardo was required to register as a sex offender with the sheriff's office. He was not registered at his wife's address. Id. Furthermore, Alley reported that Pardo's wife would babysit for two grandchildren that were seventeen months old and two years old.³ Id.

On December 3, 2009, another hearing was held. The prosecutor referenced the violation report dated November 25, 2009 and said she "trusted" that the court and Pardo's attorney had copies. 12/3/09 RP 2. Neither Pardo nor the court indicated otherwise. Pardo requested a continuance for one month to address the allegations. 12/3/09 RP 4. Pardo wished to explore the possibility that Tracer would allow him to return to treatment, or seek a new therapist to address the allegation that he had been terminated. Pardo also wished to interview Alley to investigate the

³ This was particularly concerning since Pardo's conviction was for sexually abusing a relative while his wife was present in the apartment.

allegation in the November 25, 2009 notice of violation that he was living with his wife in Kent. 12/3/09 RP 4.

On December 17, another hearing was held. The prosecutor noted that the State was seeking to revoke the SSOSA based on the nine alleged violations. 12/17/09 RP 2. Pardo was seeking release from custody while the revocation hearing was pending to facilitate finding a new treatment provider. 12/17/09 RP 5. Pardo said he was still investigating some of the allegations. 12/17/09 RP 6. Pardo addressed the court and indicated, "I know the charges and what I'm facing." 12/17/09 RP 6. The State informed Pardo and the Court of her intent to call three witnesses at the revocation hearing: Tracer, Alley, and the CCO. 12/17/09 RP 9. The State also prepared a packet of documents including the progress reports and DOC reports. 12/17/09 RP 9. The prosecutor provided all the documents to the court and Pardo at the hearing on December 17, 2009. 12/17/09 RP 10. The court granted Pardo's continuance request to prepare.

On January 8, 2010, Pardo requested another continuance of the revocation hearing to prepare. The State again noted the intent to revoke the SSOSA based on the two notices of violations dated November 13th and November 17th. 1/8/10 RP 3-4. Pardo

still wished to interview Alley, and was continuing to seek a new treatment provider. 1/8/10 RP 5. Pardo indicated he had contacted five treatment providers. 1/8/10 RP 6. Alley was present in court for the hearing. 1/8/10 RP 3. Alley's interview with Pardo's lawyer was scheduled for the following week. 1/8/10 RP 7. The Court granted Pardo's second request for a continuance to prepare.

The violation hearing began on January 27, 2010.⁴ The State called Pardo's therapist, Tracer. Tracer testified that she had terminated Pardo from treatment on November 12, 2009. 1/27/10 RP 27. Tracer terminated Pardo because he was having a sexual relationship without approval from his therapist, he was not staying at his authorized residence, and he had failed to attend a treatment session as directed. 1/27/10 RP 23. Tracer also noted that Pardo had contact with minor children. 1/27/10 RP 20-21. Pardo also had provided false information to her by indicating he was not having a sexual relationship when he signed in for treatment sessions. 2/10/10 RP 7.

The State suggested that no further testimony was necessary because Pardo had no treatment provider and therefore

⁴ The court continued to take testimony on February 5, February 8, February 10, and February 11.

could not remain on his SSOSA. 2/5/10 RP 3. Counsel for Pardo indicated he was "prepared to go forward with testimony and continue my cross-examination and cross-examination of other witnesses." 2/5/10 RP 5. Pardo's CCO, Christopher Duran, testified that he met with Pardo on July, 10, 2008, the day he was released from jail. 2/5/10 RP 62. Duran reviewed the conditions of his supervision including Appendix H. 2/5/10 RP 68. Duran went over the conditions including the requirement that he follow all treatment recommendations, the prohibition against contact with children other than his own, and the need for approval to enter into a romantic relationship. 2/5/10 RP 68-69. Duran visited Pardo's wife's apartment and determined it was not a suitable place for him to live due to the presence of children and alcohol. 2/5/10 RP 72-73. Duran approved the residence of Pardo's father. 2/8/11 RP 4. Pardo was required to register as a sex offender with the sheriff's office and Duran verified that Pardo was registered at his father's address. 2/8/10 RP 6.

Duran had communicated with Pardo's therapist, Tracer, and learned that he had admitted to having a sexual relationship without authorization. Tracer told Pardo to report to Duran and attend an additional group session on the next day, November 11th. 2/8/11

RP 10. Pardo did not report as directed. 2/8/11 RP 10. Duran attempted to contact Pardo at his father's residence but Pardo was not there. Duran gave a message to Pardo's father to contact him. 2/8/11 RP 11. Duran called again on November 12th and Pardo's father admitted that Pardo had not been staying there.⁵ 2/8/11 RP 11. Pardo called Duran on November 13th at approximately 4:50 p.m., ten minutes before the office closed, and asked if he needed to report. Pardo claimed to be ten minutes away. 2/8/11 RP 12-13. Duran waited until six o'clock, but Pardo did not report. 2/8/10 RO 13.

The trial court revoked Pardo's SSOSA on February 11, 2010. The trial court found Pardo violated the terms of his sentence "as alleged in the Notice of Violation dated 11/13/09 & 11/25/09." CP 51. The trial court listed the following violations:

1. The defendant failed to make reasonable progress in a sexual deviancy program with Jeanglee Tracer . . . and was terminated on November 12, 2009.
2. Failure to comply with treatment guidelines by entering into a romantic relationship without therapist or CCO approval on or about 10/30/09.
3. Failure to comply with treatment guidelines by providing false information to therapist on or before 11/2/09.

⁵ Pardo's father testified at the revocation hearing and denied making this statement. 2/10/11 RP 10-11.

4. Failure to reside nightly at DOC approved residence since or about 11/9/09.
5. Failure to attend sexual deviancy treatment group as directed on 11/10/09.
6. Failure to report to CCO as directed on 11/10/09 and 11/13/09.
7. Unapproved contact with minor children on or about 4/1/09.
8. Failure to reside at DOC approved residence nightly since 4/1/09.
9. Failure to comply with registration guidelines for failure to report a change of address on or about 4/1/09.

CP 51-52.⁶ The court revoked Pardo's SSOSA requiring him to serve his prison sentence.

C. ARGUMENT

1. PARDO RECEIVED PROPER NOTICE OF THE ALLEGED VIOLATIONS THAT LED TO THE REVOCATION OF HIS SSOSA.

Pardo alleges that his due process rights were violated because the State failed to provide notice of the alleged violations. Pardo is incorrect. The record clearly shows Pardo was given adequate notice. Furthermore, he has failed to preserve any due process claim because he failed to object in the trial court.

⁶ Pardo notes that the numerical assignments of the violations in oral ruling do not correspond to the written order. The numbers assigned to the violations in the oral ruling correspond to the notices of violations dated November 13th and November 25th.

The SSOSA statute provides that a sentencing court may suspend the sentence of a first-time sexual offender if the offender is shown to be amenable to treatment. RCW 9.94A.670. A SSOSA sentence may be revoked at any time where there is sufficient proof to reasonably satisfy the trial court that the defendant has violated a condition of the suspended sentence or has failed to make satisfactory progress in treatment. State v. McCormick, 166 Wn.2d 689, 705, 213 P.3d 32 (2009); RCW 9.94A.670(10). Once a SSOSA is revoked, the original sentence is reinstated. State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999).

A trial court's decision to revoke a SSOSA is reviewed for an abuse of discretion. State v. Partee, 141 Wn. App. 355, 361, 170 P.3d 60 (2007). A trial court abuses its discretion only where the trial court's decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The revocation of a SSOSA is not a criminal proceeding. Dahl, 139 Wn.2d at 683. Accordingly, the due process rights afforded at a revocation hearing are not the same as those afforded at the time of trial. In re Personal 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. State v. Nelson, 103 Wn.2d 760, 763, 697 P.2d 579 (1985); Dahl, 139 Wn.2d at 683. Sexual offenders who face SSOSA revocation are entitled the same minimal due process rights as those afforded during the revocation of probation or parole. State v. Badger, 64 Wn. App. 904, 907, 827 P.2d 318 (1992); Dahl, 139 Wn.2d at 683.

The United States Supreme Court has determined the minimal due process requirements of parole violations. Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). This includes written notice of the claimed violations and disclosure of the evidence. Id. at 489. The purpose of notice is to allow the offender “the opportunity to marshal facts in his defense.” Dahl, 139 Wn.2d at 684 (citing Morrissey, 408 U.S. at 489). In Dahl, the Washington Supreme Court noted that the State adequately informed Dahl of the facts supporting its allegation by providing him with copies of the treatment provider reports. Id. at 689-90.

a. Pardo Waived Any Due Process Violation By Failing To Object.

Pardo failed to preserve any due process violation by failing to object to a lack of notice of the alleged violations. A person

accused of violating the conditions of sentence has some responsibility for protecting his 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, to a violation of due process. Id. at 297.

A defendant must make a timely objection to preserve a due process claim that he was not given proper notice. Id. at 299-300. In State v. Nelson, 103 Wn.2d 760, 697 P.2d 579 (1985), the court held that a defendant could not sit by while his due process rights were violated at a hearing and then allege due process violations on appeal. The same principle applies to notice requirements. In Robinson, the court held, “improper notice should be treated in the same manner, as notice is also an element of due process under Morrissey. Because Robinson did not object to notice at the modification hearing, he waived the notice requirements and we will not address the issue on appeal.” Robinson, 120 Wn. App. at 200-300.

In the present case, Pardo did not object once to a lack of notice. The process of revoking his SSOSA took several months and Pardo never suggested he was unable to respond due to a lack of notice. Furthermore, in Robinson, this Court pointed out that “it

is apparent that Robinson was prepared to address the merits of the allegations at the hearing.” Id. at 300 n.3. Likewise, the record demonstrates that Pardo was prepared for the revocation hearing. He had interviewed witnesses and sought a new treatment provider to meet the allegations. Pardo's demonstrated ability to defend the SSOSA revocation contradicts his claim that his due process rights were violated.

b. Pardo Received Proper Notice Of The Violations.

Pardo claims he was not provided adequate notice of the alleged violations. The record does not support Pardo's argument. The State provided Pardo with detailed violation reports that clearly set forth the alleged violations as well as a summary of the evidence to support them. Furthermore, the record demonstrates that Pardo was able to mount his defense.

The record shows that Pardo was provided notice of the alleged violations and was fully prepared to address the State's claims. On November 17, 2009, the prosecutor informed the court that it was providing the parties with all the evaluations, notice of violations, and special reports from DOC. 11/17/09 RP 3. The

record also reflects that on December 3, 2009, the prosecutor believed that she had provided a copy of the notice of violation dated November 25th to the defense. 12/3/09 RP 3. The violation reports clearly set forth the alleged violations and a summary of the supporting evidence. Supp. CP ____ (Sub No. 124, violation report dated 11/13/09, p. 79-86). Also, the trial court stated that it had reviewed the notice of violations dated November 13, 2009, and November 25, 2009, when revoking Pardo's SSOSA. CP 51.

Pardo alleges on appeal that the court file did not contain any notices of the alleged violations. The trial court requested that the documents numbered 1-89, which included the notice of violations, be filed. 2/11/10 RP 49. This would have included the DOC violation report dated November 13th and November 25th that provided notice of the nine allegations upon which the trial court based the revocation. However, Pardo requested that none of the documents be filed until he was provided an opportunity to redact personal information from them. 2/11/10 RP 49. This did not occur until March 8, 2011, after Pardo filed his opening brief. The trial court supplemented the record pursuant to RAP 7.2(b). The additional records demonstrate that Pardo had proper notice of the alleged violations and the evidence to support them.

Pardo requested several continuances of the revocation hearing to prepare to address the allegations. It is noteworthy that none of Pardo's requests were based on a lack of notice or surprise about the allegations. The requests for the continuances demonstrate familiarity with the allegations as Pardo's counsel was actively investigating and preparing to meet the alleged violations. Pardo was able to interview witnesses to prepare for the violation hearing. 1/8/10 RP 7. Pardo knew the State was seeking revocation based on being terminated from treatment. Pardo attempted to convince his treatment provider to accept him back in treatment in response to the allegation. 12/3/09 RP 3. Pardo also attempted to obtain treatment with different therapists to address the allegation that he had been terminated from treatment. 1/8/10 RP 6.

In sum, the record amply demonstrates that Pardo had notice of the violations alleged and was afforded an opportunity to prepare for the hearing. Pardo's due process claim is without merit.

2. PARDO RECEIVED PROPER NOTICE OF THE CONDITIONS OF HIS SENTENCE BEFORE THE ALLEGED VIOLATIONS HAD OCCURRED THAT LED TO THE REVOCATION OF HIS SSOSA.

Pardo argues that he did not receive adequate notice of the conditions of the SSOSA in violation of his due process rights. Pardo is incorrect. He was given actual notice of his SSOSA conditions when his CCO met with him prior to his release, and when the error was discovered and the Appendix H was filed.

Due process requires that a person be afforded a fair warning of proscribed conduct. Spokane v. Douglas, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). Due process notice can be demonstrated with evidence that the offender received actual notice of proscribed conduct. In State v. Harris, 97 Wn. App. 657, 985 P.2d 217 (1999), a defendant on a SSOSA was deaf and argued he did not have adequate notice of the conditions of his supervision because there was no sign language interpreter provided during meetings with his CCO. This Court rejected his argument because the evidence showed he had actual notice of “clear guidelines for his conduct.” Id. at 656. Harris's CCO met with him and went over his judgment and sentence and he seemed to understand. Id. at 650. The court noted “Harris's own actions in complying with the conditions of his SSOSA defeat his argument that without an interpreter he did not have adequate notice of what he was required to do.” Id. at 655. Harris also was able to comply

with numerous conditions of his SSOSA before his revocation. Id. at 655-56.

Like the defendant in Harris, Pardo had actual notice of the conditions of his SSOSA. It was Pardo that proposed the SSOSA. When the trial court imposed sentence he included, "all the other requirements of a SSOSA sentence." 1/4/08 RP 14. Pardo's CCO had a copy of the Appendix H that contained the conditions of Pardo's sentence and went over them with Pardo before he was released from jail on July 10, 2008. 2/5/10 RP 65, 68. Pardo was generally compliant with the conditions until the problems arose in November 2009. 2/5/10 RP 20. On August 22, 2008, when the trial judge learned that the Appendix H was not in the court file, he was "baffled by why it wasn't filed when the judgment was filed." 8/22/08 RP 10. The court signed and filed the Appendix H. A court has the authority to correct an erroneous sentence. State v. Broadaway, 133 Wn.2d 118, 136, 942 P.2d 363, 373 (1997). Pardo did not object to filing the Appendix H on August 22, 2008. The Appendix H was filed prior to any of the violations that led to Pardo's revocation.⁷

⁷ The earliest alleged violation that led to the revocation of Pardo's sentence was failing to reside at an approved address and failing to properly register starting April 1, 2009, more that eight months after the Appendix H was filed.

At no time during the violation hearing did Pardo contend that he did not understand the conditions of his sentence. Pardo never argued to the trial court that his due process rights were violated by a lack of notice of the conditions of sentence. 2/11/10 RP 40-44. The record demonstrates that Pardo had notice of the conditions of his SSOSA and should reject his due process argument.

3. THE COURT APPLIED THE PROPER STANDARD OF PROOF WHEN REVOKING PARDO'S SSOSA.

Finally, Pardo argues the trial court applied the wrong standard of proof when finding the violations had been committed. Pardo argues that the court was required to find the violations by a preponderance of the evidence. Pardo's argument is contrary to Washington law.

A trial court may impose a SSOSA, which suspends the sentence for a first time sex offender, if the offender is proven amenable to treatment. RCW 9.94A.670(2)(a), (b), (3); State v. Dahl, 139 Wn.2d 678, 682, 990 P.2d 396 (1999). The trial court may revoke a SSOSA at any time if it reasonably believes that an

offender has violated a sentencing condition or has failed to make progress in treatment. RCW 9.94A.670(10); Dahl, 139 Wn.2d at 683, 990 P.2d 396 (1999). A trial court's decision to revoke a suspended sentence is reviewed for an abuse of discretion.

Badger, 64 Wn. App. at 908.

Due process requires a hearing before revoking community custody. Morrissey, 408 U.S. at 487-88; In re Pers. Restraint of McNeal, 99 Wn. App. 617, 630, 994 P.2d 890 (2000). A revocation hearing, however, does not require "a full-blown criminal prosecution because society has already been put to the burden of proving beyond a reasonable doubt that [the] defendant was guilty of the crime." State v. Canfield, 154 Wn.2d 698, 706, 116 P.3d 391 (2005) (citing State v. Johnson, 9 Wn. App. 766, 772, 514 P.2d 1073 (1973)); see also Morrissey, 408 U.S. at 483 (holding that the State has an "overwhelming interest" in revoking parole without the burden of a new criminal trial).

During a revocation hearing, a defendant is afforded only minimal due process protections, particularly: (a) written notice of the claimed violations of parole, (b) disclosure of the evidence against him, (c) an opportunity to be heard in person and to present witnesses and documentary evidence, (d) the right to confront and

cross-examine adverse witnesses, (e) a neutral and detached hearing body, and (f) a written statement by the fact finder as to the evidence relied on and the reasons for revoking community custody. Morrissey, 408 U.S. at 489; State v. Abd-Rahmaan, 154 Wn.2d 280, 285-86, 111 P.3d 1157 (2005); see also Dahl, 139 Wn.2d at 683, 990 P.2d 396 (1999) (holding that Morrissey due process requirements apply to SSOSA revocation hearings). The purpose of these requirements is to ensure that the finding of a violation is based on verified facts. Morrissey, 408 U.S. at 484.

The Washington Supreme Court has long held that the State need not prove SSOSA violations beyond a reasonable doubt; the court need only be "reasonably satisfied" that the violation of a condition occurred. Dahl, 139 Wn.2d at 683, 990 P.2d 396 (decided after Morrissey); State v. Hultman, 92 Wn.2d 736, 745, 600 P.2d 1291 (1979); State v. Kuhn, 81 Wn.2d 648, 650, 503 P.2d 1061 (1972); State v. Shannon, 60 Wn.2d 883, 889, 376 P.2d 646 (1962), overruled on other grounds by Mempa v. Rhay, 68 Wn.2d 882, 416 P.2d 104 (1966); see also Badger, 64 Wn. App. at 908, 827 P.2d 318.

Pardo concedes that the bulk of Washington cases recognize the "reasonably satisfied" burden of proof. Brief of

Appellant at 17. Pardo argues that because the Morrissey due process requirements seek to ensure that the revocation is based on verified facts, this requires a finding of the violation by a preponderance of the evidence. Pardo asserts that facts are only verified when proven to be more likely true than false.

But the Morrissey court never addressed the burden of proof. Instead, the Morrissey court limited its analysis to “deciding the minimum requirements of due process” and required only the six protections enumerated above. Morrissey, 408 U.S. at 488-89. The only mention of burden of proof in Morrissey was that the State had an interest in “return[ing] the individual to imprisonment without the burden of a new adversary criminal trial.” Morrissey, 408 U.S. at 483. Morrissey did not require a specific burden of proof.

Pardo argues Washington decisions using the “reasonably satisfied” standard did so without the benefit of any analysis of the burden of proof required by Morrissey. As stated above, Morrissey did not perform a burden of proof analysis. Additionally, Washington Supreme Court cases using the “reasonably satisfied” standard also incorporate the due process requirements enumerated in Morrissey. Dahl, 139 Wn.2d at 683, 990 P.2d 396 (1999); see also Badger, 64 Wn. App. at 907. Thus, there is no

evidence that these decisions failed to properly consider the Morrissey requirements.

Furthermore, Pardo has failed to explain why he is entitled to relief in the instant case. Pardo conceded that he had been terminated from his sexual deviancy treatment. 2/11/10 RP 43. Despite having ample opportunity, he could find no treatment provider willing to accept him. Pardo could not continue on his SSOSA without a treatment provider. See RCW 9.94A.670. Thus, Pardo's SSOSA was a failure under any standard of proof.

The trial court properly applied the "reasonably satisfied" burden of proof to the revocation of Pardo's SSOSA. This Court should decline Pardo's invitation to overrule substantial precedent endorsing the "reasonably satisfied" standard of proof for a SSOSA revocation.

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm the revocation of Pardo's SSOSA.

DATED this 13th day of March, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent's, in STATE V. JOSE PARDO, Cause No. 65038-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

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Name
Done in Seattle, Washington

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