

No.35736- 4-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DERRICK BOYD,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

REPLY 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.

In addition, Mr. Boyd has argued in his Statement of Additional Grounds that his offender score was improperly calculated.¹

¹ At the Court’s invitation, counsel filed a response to Mr. Boyd’s statement agreeing with and in support of Mr. Boyd’s contention that his offender score was improperly calculated. Despite the court’s invitation to do so, to date the State has not responded to Mr. Boyd’s argument regarding his offender score. The argument is not addressed in this reply.

B. ARGUMENT

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

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). Concluding the revocation of a SSOSA is

the constitutional equivalent of either parole or probation revocation, the Supreme Court has expressly found these requirements apply to the revocation of a SSOSA. State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999).

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. The State grossly mischaracterizes Mr. Boyd’s argument as seeking an additional requirement of proof beyond that required by Morrissey. Brief of Respondent at 10. Mr. Boyd has argued simply that a fact is not verified if it is not at least more likely true than not. Thus, has argued that the reasonably satisfied standard is thus violative of due process, and that a court must instead employ a preponderance of the evidence standard of proof..

In making his argument, Mr. Boyd has readily acknowledged that cases addressing SSOSA revocations have parroted the statement that that the court be “reasonably satisfied” that the violations justifying revocation occurred. See Brief of Appellant 7-8 (discussing, Dahl, 139 Wn.2d at 683; State v. Badger, 64 Wn.App.

904, 908-09, 827 P.2d 318 (1992); 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)). Mr. Boyd has pointed out the standard announced in these cases predate Morrissey and the standard has never been analyzed in light of the requirements of that seminal case. The State, apparently believing that a statement repeated often enough must be true, responds by simply citing these cases, with no effort to defend the absence of a post-Morrissey analysis of the burden of proof. Brief of Respondent at 13.

The State attempts to draw a distinction between SSOSA revocations and DOSA revocations contending that while the former is a suspended sentence the later is not. Brief of Respondent at 13. But the distinction the State attempts to draw is neither real nor constitutionally relevant. First, the nonconfinement portion of the sentence in both the DOSA and SOSA context are by definition community custody. Compare RCW 9.94A.660(6)(a) (in imposing 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”). Second, cases addressing revocations of SSOSA and

DOSA, as well as cases addressing sentence modifications, have applied the same constitutional standard without mention of whether the sentence was suspended or not. Compare Dahl, 139 Wn.2d at 683 (applying Morrissey to SSOSA revocation); In re the Personal Restraint Petition of McNeal, 99 Wn.App. 617, 628, 994 P.2d 890 (2000) and In re the Personal Restraint Petition of McKay, 127 Wn.App. 165, 169-70, 110 P.3d 856 (2005) (each applying Morrissey to DOSA revocation); and State v. Abd-Rahmaan, 154 Wn.2d 280, 286, 290, 111 P.3d 1157 (2005) (applying Morrissey and Dahl to community placement violation hearing). These cases do not suggest any difference in the constitutional standard based upon the nature of the sentence.

The State baldly claims the application of the preponderance standard is unique to DOSA revocation and “breaks with the traditional standard.” Brief of Respondent at 15. The State is incorrect.

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).

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 the lower standard of "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). Federal law similarly 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).

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; RCW 9.95.435; RCW 9.94.A.737; WAC 137-104-050.

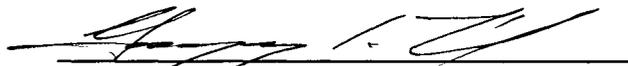
Thus, the only scenario in which a lower standard of proof has been applied to the revocation community custody is the revocation of SSOSA.

Finally, the State contends that a distinction in the burden of proof is warranted by the fact that the trial court rather than the Department of Corrections presides over a SSOSA revocation. Brief of Respondent at 15-16. But in fact, the Supreme Court citing to the need for institutional safety, has allowed lessened procedural protections in administrative prison-disciplinary hearings than has been permitted in other settings. Wolff, 418 U.S. 539. Thus, limitations on the required process have been permitted not because of the perceived reliability of the factfinder but rather because of extraneous limitations which demand a lower standard. See also Abd-Rahmaan 154 Wn.2d at 290 (rejecting argument that perceived reliability of hearsay alone is sufficient for due process purposes to allow its admission and requiring an additional showing of a impediment to the live testimony).

C. CONCLUSION

For the reasons above, and those set forth in his prior briefing, statement of additional grounds and counsel response, this Court must reverse the trial court's order and reinstate Mr. Boyd's SSOSA.

Respectfully submitted this 31st day of December, 2007.



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APPELLANT.)	

DECLARATION OF SERVICE

I, MARIA ARRANZA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 31ST DAY OF DECEMBER, 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF DECEMBER, 2007.

x _____ *Smil*

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BY Smil
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