

NO. 41450-3

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STATE OF WASH

BY *[Signature]*

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL ANTHONY FONTENOT, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Elizabeth P. Martin

No. 05-1-05959-3

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should the Court reject defendant's claim that he received insufficient notice of his violations when he failed to preserve the issue below and stipulated to the six violations underlying his SSOSA revocation?

B. STATEMENT OF THE CASE.

On July 21, 2010, the Pierce County Pierce County Prosecutor's Office filed a petition for hearing to determine whether appellant MICHAEL ANTHONY FONTENOT ("defendant") was out of compliance with a condition of sentence. CP 47-50. The petition alleged defendant "had contact with a minor on or about 7/15/10" CP 47-50. The Department of Corrections ("DOC") filed a report in support of the 7/15/10 violation on September 8, 2010, which further alleged defendant had prohibited contact with a minor on September 30, 2009, and July 11, 2010. CP 51-74.

The conditions of defendant's suspended sentence began on June 2, 2006, when he was sentenced to 131 months in custody with 125 months suspended pursuant to Special Sex Offender Sentencing Alternative ("SSOSA"). CP 23-36. The sentencing court granted defendant's SSOSA following his plea of guilty to two counts of rape of a child in the second degree for having an ongoing sexual relationship with

his daughter when she was between the ages of eight and thirteen. CP 9-22, 23-36; RP 22, 26-31. The case file shows defendant convinced himself that his daughter liked being with him sexually and purposely did things to arouse him. RP 22, 26-31.

Among the other conditions of his SSOSA, defendant was ordered to have no contact with minors. CP 34, 38. Defendant was also required to inform his community corrections officer (“CCO”) of any romantic relationships so that his CCO could ensure no victim-age children were involved. CP 34, 38. On January 12, 2007, the court sentenced defendant to an additional thirty days in custody for four stipulated violations. CP 41-42. On November 26, 2008, the court again modified defendant’s sentence to impose an additional one hundred twenty days in custody for having prohibited contact with minor children and engaging in a romantic relationship without notifying his CCO. CP 45-46; RP 24-25.

A modification hearing was held on October 26, 2010, to address defendant’s pending violations. CP 106-108; RP 1-66. Defendant did not object to notice and stipulated to the six violations alleged by the State: (1) that he had incidental contact with a minor at a shopping mall on September 30, 2009; (2) that he had contact with a six year old girl in a church building on July 11, 2010; (3) that the same six year old girl accompanied him during a several hour outing with her mother on July 15, 2010; during the outing the three of them walked around a pier, had dinner at Red Robin, and took a boat cruise around Seattle harbor; (4) that he

engaged in a romantic relationship with the six year old girl's mother without first notifying his CCO; (5) that he engaged in a dating relationship the mother of a six year old girl without prior approval from his CCO; and (6) that he had proximity contact with the six year old girl on five to ten occasions. RP 4-9, 31-32¹.

With the violations acknowledged, the sentencing court was left to determine the appropriate punishment. RP 4, 46. Defendant called his former treatment provider (Jeangless Tracer) as a witness to persuade the court to extend his treatment in lieu of revoking his SSOSA. RP 9-10, 12, 32. During cross examination Ms. Tracer conceded that since defendant's SSOSA was granted he had prohibited sexual relationships with three women, two of which had minor children. RP 24-26, 38. After considering the evidence, the court revoked defendant's SSOSA. CP 106-108; RP 63-64.

Defendant filed a timely notice of appeal from the entry of the order revoking suspension of sentence. CP 109-112.

¹ On October 26, 2010, defendant filed a memorandum in opposition to motion to revoke. CP 75-103. Defendant's memorandum objected to the court's consideration of the September 8, 2010, DOC violation report, citing due process grounds but defendant did not make this objection at his modification hearing. CP 81.

C. ARGUMENT.

1. THE COURT SHOULD REJECT DEFENDANT'S CLAIM THAT HE RECEIVED INSUFFICIENT NOTICE OF HIS VIOLATIONS WHEN HE FAILED TO PRESERVE THE ISSUE BELOW AND STIPULATED TO THE SIX VIOLATIONS UNDERLYING HIS SSOSA REVOCATION.

“The revocation of a suspended sentence is not a criminal proceeding.” *State v. Dahl*, 139 Wn.2d 678, 683, 990 P.2d 396 (1999). citing *State ex rel. Woodhouse v. Dore*, 69 Wn.2d 64, 416 P.2d 670 (1966).

Accordingly, “[a]n offender facing revocation of a suspended sentence has only minimal due process rights.” *Id.* at 683 citing *State v. Nelson*, 103 Wn.2d 224, 230, 691 P.2d 964 (1984). “Sexual offenders who face SSOSA revocation are entitled the same minimal due process rights as those afforded during revocation of probation or parole.” *Id.* at 683 citing *State v. Badger*, 64 Wn. App. 904, 907, 827 P.2d 318 (1992).

“The United States Supreme Court has determined that, in the context of parole violations, minimum 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.” *Id.* at 683 citing *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).

Alleged due process violations are reviewed de novo. *In re Pers. Restraint of Heidari*, 159 Wn. App. 601, 605, 248 P.3d 550 (2011). However, “a defendant c[an] not sit by while his due process rights [a]re violated at a hearing and then allege due process violations on appeal.” *State v. Robinson*, 120 Wn. App. 294, 299, 85 P.3d 376 (2004) citing *State v. Nelson*, 103 Wn.2d 760, 697 P.2d 579 (1985). “[N]otice should be treated in the same manner, as notice is also an element of due process under *Morrissey*.” *Id.* at 299.

Once the due process requirements under *Morrissey* have been perfected or waived, “the government has an important interest in protecting society, particularly minors, from a person convicted of raping a child. That interest is rationally served by imposing stringent conditions related to [that] crime” *State v. McCormick*, 166 Wn.2d 689, 702, 213 P.3d 32 (2009). “[A defendant’s] rights are already diminished significantly [when] he [i]s convicted of a sex crime and, only by the grace of the trial court, allowed to live in the community subject to stringent conditions. Those conditions... serve an important societal purpose in that they are limitations on [a defendant’s] rights that relate to the crimes he committed.” *Id.* at 702-703 (The trial court did not abuse its discretion when it revoked McCormick’s suspended sentence for frequenting an area where minors congregate after defendant had received two prior violations

for having contact with minor children and frequenting areas where children congregate by visiting a church, a park, and a school.).

“Under the Sentencing Reform Act ... the trial court may revoke a SSOSA sentence whenever the defendant violates the conditions of the suspended sentence or the court finds the defendant is failing to make satisfactory progress in treatment.” *Id.* at 698, *see also* RCW 9.94A. 670. “Once a SSOSA is revoked, the original sentence is reinstated. *State v. Miller*, 159 Wn. App. 911, 918, 247 P.3d 457 (2011) citing *State v. Dahl*, 139 Wn.2d 678,683, 990 P.2d 396 (1999).

“A trial court’s decision to revoke a SSOSA suspended sentence is reviewed for an abuse of discretion.” *State v. Miller*, 159 Wn. App. at 918. “A trial court abuses discretion only where the trial court’s decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Id.* at 918 citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In *Robinson*, the sentencing court imposed three hundred sixty days of confinement for eight SSOSA violations alleged by the State during Robinson’s modification hearing. 120 Wn. App. at 297-298. Robinson admitted to five of the listed allegations and did not object to notice. *Id.* 297-298. On appeal, Robinson argued that his due process rights under *Morrissey* were violated because he did not receive proper notice of the alleged violations. *Id.* at 299. The Court of Appeals held it would not address notice on appeal because Robinson waived the requirements by

failing to object to insufficient notice at his modification hearing. 299-300.

Similar to Robinson, the defendant at bar stipulated to the only violations alleged at his modification hearing and otherwise waived any objection to insufficient notice when he failed to preserve the issue below.

Defendant has also failed to prove that he did not receive the minimal due process required by *Morrissey*. Defendant stipulated to the evidence provided in support of his violations after receiving a written petition for review which requested the revocation of his suspended sentence. CP 47-50, 51-74, 78-79; RP 4-9. He had an opportunity to be heard, called the only witness who testified at his hearing, and was informed why his SSOSA was being revoked by the Superior Court Judge who ordered it. RP 1-66. The minimal due process attending SSOSA revocation requires no more.

On appeal, defendant argues that the sentencing court bypassed the six violations properly before it and revoked defendant's SSOSA for an unalleged failure to make progress with treatment. Defendant's argument is not credible. First, defendant officially completed his SSOSA treatment three months prior to the modification hearing, so his progress with ongoing treatment was not at issue. RP 9-10, 32. Second, a fair reading of the record shows that it was defendant who first introduced his treatment history in an effort to persuade the sentencing court that additional treatment was a more appropriate remedy than the SSOSA

revocation requested by the State. RP 9-10. In response, the State argued that additional treatment was inadequate to address the danger inherent in defendant's repeated violations involving minor children and prohibited relationships. RP 44-51, 58-61. In turn, the sentencing court revoked defendant's SSOSA finding additional treatment inadequate to ensure defendant would not reoffend. RP 43, 63-64. Accordingly, defendant's SSOSA revocation should be affirmed.

D. CONCLUSION.

Defendant stipulated to the only violations alleged at his modification hearing and otherwise waived any objection to insufficient notice when he failed to preserve the issue below. Defendant's SSOSA revocation should be affirmed.

DATED: JUNE 13, 2011

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6/14/11 [Signature]
Date Signature

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