

65038-6

65038-6

COA No. 65038-6

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,
Respondent,

v.

JOSE PARDO,

Appellant.

2018


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

The Honorable Steven Gonzalez

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in revoking Jose Pardo's SSOSA suspended sentence and in imposing the sentence on his original judgment.

2. The trial court violated Mr. Pardo's due process rights in revoking his SSOSA sentence in the absence of notice to him of the conditions required to be followed as part of the suspended sentence.

3. The trial court violated Mr. Pardo's due process rights in revoking his SSOSA sentence in the absence of notice of the violations alleged.

4. The trial court employed an incorrect standard of proof in determining whether Mr. Pardo had violated the conditions of his SSOSA sentence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires that a defendant must be told what conditions he is required to follow as part of his SSOSA suspended sentence, before the sentence can be revoked on the ground that he has violated conditions. In Mr. Pardo's case, where the required "Appendix H" to the SSOSA sentencing document, containing the

conditions of his suspended sentence, was never filed or provided to Mr. Pardo, did the trial court violate the defendant's due process rights in revoking his SSOSA sentence on the ground of such alleged violations?

2. Was this deficiency in notice cured by the fact that everyone connected with the case, except apparently Mr. Pardo himself, had a copy of Appendix H?

3. Where no notice of the alleged violations of SSOSA sentence was provided to Mr. Pardo, much less the briefest of factual descriptions as to how the alleged conditions were supposedly violated, did the trial court violate Mr. Pardo's procedural due process rights in revoking his SSOSA sentence in the absence of notice of the violations alleged?

4. Where the trial court in its oral ruling stated that it did "find" that Mr. Pardo violated conditions, and in its written order stated that the court was "satisfied" that the violations occurred, did the court violate Mr. Pardo's due process rights by failing to employ the "preponderance of the evidence" standard of proof?

C. STATEMENT OF THE CASE

By order entered February 11, 2010, following multiple hearings held in January and February of 2010, the King County Superior Court stated that it was “satisfied” that Jose Pardo did “willfully violate the terms and conditions of his suspended sentence (as alleged in the Notice of Violation dated 11/13/09 and 11/25/09).” CP 51-52. Based on the finding of violations, the court revoked Mr. Pardo’s SSOSA suspended sentence, ordering him to serve the remainder of his indeterminate sentence of 78 months to Life.¹

According to the trial court’s written order of revocation, the defendant violated certain conditions of his SSOSA sentence as follows:

- (1) the defendant failed to make reasonable progress in a sexual deviancy treatment program with Jeanglee Tracer, Tracer Therapy (formerly with Comte and Associates) and was terminated on 11/12/09;
- (2) failure to comply with treatment guideline by entering into a romantic relationship without therapist or CCO approval on or before 10/30/09;
- (3) failure to comply with treatment guidelines by providing false information to therapist on or before

¹Mr. Pardo was convicted by plea of guilty to the offense of Rape of a Child in the Second Degree, with judgment entered January 25, 2008. CP 17-33, 34-42.

- 11/2/09;
- (4) failure to reside nightly at DOC approved residence since on or about 11/9/09;
 - (5) failure to attend sexual deviancy treatment group as directed on 11/10/09;
 - (6) fail 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. The trial court's oral ruling recites a different numbering of the alleged violations than the written order. 2/11/10RP at 44-46. The court declined to find what it identified in its oral ruling as alleged violation "three," that minors were allegedly present during Mr. Pardo's contact with the woman with whom he had an unapproved relationship. 2/11/10RP at 45.

However, Mr. Pardo's judgment and sentence imposing the SSOSA sentence did not include notice of the particular conditions of the suspended sentence to be followed. In addition, Mr. Pardo was never provided with notice of the alleged violations, much less any statement of alleged facts supporting the claimed violations. Finally, the court's statement that it was "satisfied" the violations

occurred fails to indicate whether the court employed the “preponderance” standard required by due process. See Part D, infra.

Mr. Pardo timely appeals the superior court’s order of SSOSA revocation and imposition of sentence. CP 53-56.

D. ARGUMENT

A trial court imposing a SSOSA suspended sentence may order sex offender treatment for any period up to 5 years. RCW 9.94A.670(4)(c); RCW 9.94A.670(11). The court imposing a SSOSA may also order additional conditions of the suspended sentence. RCW 9.94A.670(5). If the defendant violates any of the sentence conditions during his community custody period, or fails to make satisfactory progress in treatment, the court may revoke the suspension and order execution of the original sentence. RCW 9.94A.670(10); State v. McCormick, 166 Wn.2d 689, 213 P.3d 32 (2009).²

²The court retains discretion, however, to sanction a violation by means other than by revocation of the SSOSA. State v. Kistner, 105 Wn. App. 967, 972 n.9, 21 P.3d 719 (2001). Under RCW 9.94A.634(3), the court may instead impose a number of other sanctions, including: a period of days of confinement for each violation, work release, home detention with electronic monitoring, work crew, community restitution, educational or counseling sessions, etc. RCW 9.94A.634(3)(a)(i), (c); State v. Woodward, 116 Wn. App. 697, 67 P.3d 530 (2003); RCW 9.94A.634(3)(c). In Mr. Pardo’s case, the trial court was asked, but

If the State proves the alleged violations of the sentence conditions by verified facts, the trial court may revoke the SSOSA. State v. Dahl, 139 Wn. 2d 678, 683, 990 P.2d 396 (1999).

Although Mr. Pardo argues infra the trial court was required, but failed, to employ the preponderance standard of proof, it has been said the court need only be “reasonably satisfied” the offender violated conditions of his suspended sentence. State v. Dahl, 139 Wn.2d at 683.

In addition, the requirements of Due Process, including procedural due process, apply to the trial court’s findings of violations supporting revocation. See Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)

1. THE TRIAL COURT’S REVOCATION OF MR. PARDO’S SSOSA SUSPENDED SENTENCE FAILED TO COMPORT WITH DUE PROCESS.

a. Due process first and foremost requires notice of the conditions of the SSOSA sentence that the defendant is required to follow at pain of sanction, which notice was never provided to Mr. Pardo. Importantly, from the outset of a

declined, to exercise its discretion to impose a lesser sanction. 2/11/10RP at 46-47.

sentence imposed with conditions of parole, the federal and state constitutions' due process requirements – which may be described as requirements of substantive due process, require notice of conduct subject to sanction. See City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990) (due process requires fair warning of proscribed conduct); U.S. Const. amend. 14; Wash. Const. art. I, § 3.³

Thus an individual on a SSOSA suspended sentence has a due process right to sentencing conditions that are sufficiently clear to inform him of what conduct will result in him being returned to prison under the original sentence. See United States v. Guagliardo, 278 F.3d 868, 872 (9th Cir. 2002) (addressing due process aspect of notice). Absent a statement of the conditions required to be followed during the community supervision portion of a sentence, the defendant is not placed on fair notice of the requirements to be followed at pain of sanction. See State v. Broadaway, 133 Wn.2d 118, 135-36, 942 P.2d 363 (1997)

³The Fourteenth Amendment states: "nor shall any state deprive any person of life, liberty, or property, without due process of law." Washington Constitution art. I, § 3 states: "No person shall be deprived of life, liberty, or property without due process of law."

(judgment and sentence failed to place defendant on notice of period of time he was required to report for supervision). This notice must be in writing. See WAC 137-104-040 (“When placed on community custody, offenders shall be provided with written notice of all court and department-imposed conditions and/or requirements”).

No notice was provided to Mr. Pardo under the above standards. In the present case, it was conceded during hearings held in late 2009 that Mr. Pardo’s judgment imposing the SSOSA suspended sentence did not include the standard “Appendix H,” detailing the conditions of suspended sentence to be followed, and the judgment did not otherwise provide a clear or consistent statement of conditions. 8/22/09RP at 7.

In July of 2009, a Department of Corrections CCO indicated he believed there was a conflict between a provision in Mr. Pardo’s judgment and sentence and “Appendix H” thereto. 7/14/10RP at 2-3. Following argument, the trial court indicated it would interpret a requirement in the judgment regarding contact with children pursuant to Mr. Pardo’s reading of the condition. 7/14/09RP at 4;

see Broadway, 133 Wn.2d at 135-36 (trial court has authority to clarify conditions that are unclear).

However, after discussing this issue, the court and counsel realized the defendant's judgment and sentence did not in fact include an "Appendix H" at all. 8/22/09RP at 7. The deputy prosecutor conceded the judgment, as reflected on the Superior Court's ECR (electronic court records system), did not include Appendix H, which was indeed "the conditions of community custody." 8/22/09RP at 7. Specifically, the prosecutor admitted, "[t]he judgment and sentence that was filed with this court does not have an Appendix H attached to it, nor does the copy that I have in my file." 8/22/09RP at 7.

The trial court correctly noted this signified there was no Appendix H, because the State is given the original document to file. 8/22/09RP at 7. Although the Community Corrections Officer (CCO) had a document encaptioned Appendix H (referred to by the court as "an" Appendix H"), it was further conceded the minute record failed to show an Appendix H or that those conditions were ordered. 8/22/09RP at 7-8.

This deficiency in actual notice to the defendant himself, which was not provided before the time of the alleged violations, was in no way cured by the court and counsel's subsequent agreement that the trial court could "enter" Appendix H. See 8/22/09RP at 9. The docket fails to indicate that any such document was filed, or provided, as notice to Mr. Pardo at any time, much less at the critical time – before he allegedly violated conditions. Supp. CP ____ (Docket in King County No. 06-1-12410-0 KNT). Defense counsel's agreement with the court's statement that Appendix H could be "made part" of the judgment in no way satisfies the requirement the defendant be placed on prior notice of the conditions. See 8/22/09RP at 10. In any event, the court's belated action directing an Appendix H be "filed" is of no effect; the judgment and sentence still includes no "Appendix H." See CP 34-42; Supp. CP __ Sub # 110A (State's exhibit 8) (DOC conditions).

There was an absence of notice providing the defendant knowledge of the conditions of his SSOSA sentence. For example, in the analogous situation where the elements of RCW 26.50.110(1) (violation of a protection order) include: "(1) the

existence of an order; and (2) the restrained party's knowledge of the order," the defendant's signature on the order is required to show knowledge of the order. See State v. France, 129 Wn. App. 907, 120 P.3d 654 (2005). Knowledge of a court order can also be shown by evidence that the defendant was sent the order. State v. Van Tuyl, 132 Wn. App. 750, 133 P.3d 955 (2006).

There was no such showing that Mr. Pardo was given notice of the conditions of his SSOSA sentence, by these or any other means, is present in this case. Absent notice of the conditions of sentence, the court's subsequent findings of SSOSA violations straightforwardly violates due process. Douglass, 115 Wn.2d at 178; Guagliardo, 278 F.3d at 872; U.S. Const. amend. 14.

b. The revocation of Mr. Pardo's SSOSA suspended sentence did not comport with the Procedural Due Process requirements of *Morrissey*. The revocation of a suspended sentence is concededly not a criminal proceeding. State ex rel. Woodhouse v. Dore, 69 Wn.2d 64, 70, 416 P.2d 670 (1966). Accordingly, the procedural due process rights afforded at a revocation hearing are not the same as those afforded during trial

on the question of commission of the original alleged offense. In re Pers. Restraint of Boone, 103 Wn.2d 224, 230, 691 P.2d 964 (1984).

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, supra, 408 U.S. at 482-84; U.S. Const. amend. 14.

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 Washington Supreme Court has expressly found these requirements apply to the process of revocation of a SSOSA. State v. Dahl, 139 Wn.2d at 683. The process due to the parolee entails, inter alia:

- (a) written notice of the claimed violations of 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.

Morrissey, at 488-89. These requirements serve to assure that the finding of a parole violation will be based on verified facts of a violation of the conditions imposed, and that the court's exercise of discretion in imposing a sanction will be informed by an accurate knowledge of the parolee's behavior. Id. at 484.

Mr. Pardo never received notice of the alleged violations of his SSOSA sentence. 8/22/09RP at 7. Pursuant to Morrissey, and Dahl, due process requires that the defendant on community custody as part of his SSOSA sentence who is alleged to have violated conditions must receive (a) written notice of the claimed violations; and also (b) disclosure of the evidence against him. Indeed, the first element of due process announced in Morrissey is the provision of "written notice of the claimed violations" to the defendant. Morrissey, 408 U.S. at 489; see Dahl, 139 Wn.2d at 683. This is important, for obvious reasons. "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 v. McDonnell, 418 U.S. 539, 564, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).

Here, the superior court docket simply does not indicate that any written notice of alleged violations, much less the required brief statement of alleged facts supporting the claimed violations, was ever filed or provided to Mr. Pardo, including specifically on the dates of filing specified in the trial court's ultimate order of SSOSA revocation. Docket in King County No. 06-1-12410-0 KNT; see CP 51-52 (finding that Mr. Pardo committed violations "as alleged in the Notice of Violation dated 11/13/09 and 11/25/09"). In fact, there are no filings whatsoever on those dates.

This absence of notice of Mr. Pardo's claimed breaches of conditions is a violation of the minimum due process requirements announced in Morrissey and Dahl as applicable to probation violations. See In re Pers. Restraint of McNeal, 99 Wn. App. 617, 621, 994 P.2d 890 (2000). For example, in the setting of prison disciplinary hearings, only the barest of due process is required, to a degree even lower than revocation of probation and imprisonment, see McNeal, 99 Wn. App. at 618-20, but even in that context 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 v. McDonnell, 418 U.S. at 564. The requirement is that fundamental.

The absence of notice provided in this case was a failure of both of the above demands of the minimum “process due” to Mr. Pardo.⁴ The error in this case cannot be deemed purely technical, as Mr. Pardo was inevitably hampered in his defense to multiple alleged violations of SSOSA conditions. Notice would have been helpful.

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

(Emphasis added.) N. Cohen and J. Gobert, The Law of Probation and Parole, 553 (1983). This Court should reverse the order revoking Mr. Pardo’s SSOSA suspended sentence and remand for a new revocation hearing. Dahl, 139 Wn.2d at 683.

⁴It was only by rigorous scrutiny of the hearing record that appellate counsel was even able to determine what factual circumstances were alleged as constituting the violations of SSOSA conditions.

2. THE TRIAL COURT FAILED TO EMPLOY THE PROPER “PREPONDERANCE” STANDARD OF PROOF TO DETERMINE WHETHER MR. PARDO VIOLATED CONDITIONS OF HIS SSOSA.

Mr. Pardo was denied due process because the trial court based its decision to revoke his SSOSA sentence on less than a preponderance of the evidence. On review of the trial court’s findings in support of revocation of a suspended sentence, the Court of Appeals views the evidence in a light most favorable to the State, as it does on appeal of any trial court factual finding. See State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

However, a legal question is presented when the appellant challenges the standard of proof employed by the court below. It has been said if the State proves a violation of a SSOSA sentence condition by verified facts, the trial court may revoke the SSOSA. State v. Dahl, 139 Wn. 2d 678, 683, 990 P.2d 396 (1999), supra.

“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

Webster's Third International Dictionary, 2543. If a fact is not more likely true than false it cannot be said to be "verified." Thus, a fortiori, only if an allegation is proved by at least a preponderance of the evidence is it verified. Mr. Pardo argues that the proper standard of proof at a SSOSA revocation hearing must surely be "preponderance of the evidence." The King County Superior Court in this case stated simply that it was "satisfied" that Jose Pardo violated conditions of his sentence. CP 51-52.

Concededly, Washington cases addressing SSOSA revocation proceedings have repeated the statement in Dahl that the lower court must 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, however, does not discuss the burden of proof at revocation hearings 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).

The Kuhn case, decided the same year as Morrissey, does not address that seminal decision, 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 additionally cites 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)). There is no statute that specifies that a reasonable satisfaction 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.

It is therefore significant that none of these cases has addressed the standard of proof at SSOSA revocation hearings in light of Morrissey and its insistence upon “verified facts.” In the context of Drug Offender Sentence Alternatives (DOSAs) revocations, courts, applying Morrissey, have concluded that due process requires that 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 Personal Restraint Petition of McNeal, *supra*, 99 Wn. App. at 628

(citing Morrissey, 408 U.S. at 484); In re Personal Restraint Petition of McKay, 127 Wn. App. 165, 169-70, 110 P.3d 856 (2005).

The context of a DOSA sentence revocation is comparable to Mr. Pardo's revocation hearing. The community-based portion of a DOSA, as with the SSOSA imposed on Mr. Pardo following his 12-month term of incarceration, is 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"). Under either sentence alternative, a defendant faces a return to prison to serve a substantial sentence upon violation of conditions; in Mr. Pardo's case it was 78 months to Life. CP 34-42.

As can be seen, 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). This standard is universally applied in additional, like contexts. For further example, Department of Corrections policy expressly requires community custody violation

hearings employ the preponderance of the evidence standard. WAC 137-104-050(14). Federal law similarly required 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. See, e.g., United States v. Goad, 44 F.3d 580, 585 (7th Cir, 1995); Ellis v. D.C., 84 F.3d 1413, 1423 (D.C. 1995).

And revocation hearings for sex offenders sentenced to indeterminate sentences under RCW 9.94A.712, who have been released to community custody, likewise require findings of violation to be based on a preponderance of the evidence. RCW 9.94A.713; RCW 9.95.435; RCW 9.94.A.737; see WAC 137-104-050.

Thus, the only scenario in which a lower standard of proof has been applied to the revocation of community custody is the revocation of a SSOSA. Those cases condoning 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. But there can be no justifiable basis to

employ a lesser standard of proof for revocation of community custody in the SSOSA context than applies to revocation of community custody in every other scenario.

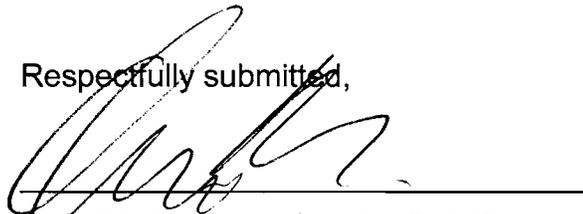
Due process required the trial court to find that the alleged violations in Mr. Pardo's case were proved by a "preponderance of the evidence," and not merely by the "satisfied" standard employed below. See CP 51-52. The revocation of Mr. Pardo's SSOSA suspended sentence denied him due process, for this additional reason.

E. CONCLUSION

Based on the foregoing, Mr. Pardo respectfully asks that this Court reverse the trial court's order revoking his SSOSA suspended sentence and imposing his original indeterminate sentence of 78 months to Life.

DATED this 29 day of November, 2010.

Respectfully submitted,



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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 65038-6-I
v.)	
)	
JOSE PARDO,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF NOVEMBER, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] JOSE PARDO 310199 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520-9504	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF NOVEMBER, 2010.

X _____ 

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