

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

STATE OF WASHINGTON,	)	No. 65038-6-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
JOSE MANUEL PARDO,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: <u>November 14, 2011</u>
	)	
	)	

Cox, J. — Jose Pardo challenges the trial court’s decision to revoke his Special Sexual Offender Sentencing Alternative (SSOSA) suspended sentence. Pardo claims he lacked notice of both the conditions of his SSOSA sentence and of the alleged violations of the conditions. He contends that revocation without adequate notice violated his right to due process. Pardo also claims that the trial court used the wrong standard of proof in determining that he committed the alleged violations.

The record does not support Pardo’s claim of inadequate notice. Because he failed to raise this issue below, Pardo waived the objection. We also conclude that the trial court applied the correct standard of proof, in accordance with the precedent of our supreme court. We affirm.

Pardo pleaded guilty to one count of rape of a child in the second degree. In January 2008, the trial court granted Pardo’s request for a SSOSA, over the

State's objection. The court imposed a minimum term of 78 months in prison, suspending all but 12 months. The judgment and sentence required that Pardo participate and make reasonable progress in a 36-month sex offender treatment program and required that he abide by all conditions of his treatment program.

Pardo was released from jail in July 2008 after completing the confinement portion of his sentence. Shortly thereafter, during an August 2008 hearing to address another matter, the prosecutor brought it to the court's attention that Appendix H to the judgment and sentence, an attachment listing various conditions of Pardo's sentence, was not included in the filed version of the judgment and sentence. The prosecutor noted, however, that the copy of the judgment and sentence received by Pardo's community corrections officer (CCO) included the attachment. The defense did not object to the court filing the Appendix H, and requested only that Appendix H should reflect the language of the judgment and sentence in excluding Pardo's own children from the restriction on his contact with minors. The court entered an order "incorporating" the Appendix H into the judgment and sentence.

On November 13, 2009, Pardo's CCO filed a notice of violation alleging six violations of the conditions of Pardo's SSOSA. Specifically, the notice claimed that Pardo failed to comply with his sex offender treatment guidelines by (1) entering into a sexual relationship without prior approval, (2) involving minor children in that relationship, (3) providing false or deceptive information to the

treatment provider by not disclosing the relationship and (4) failing to attend a treatment session as directed on November 10. The violation notice also alleged that Pardo (5) failed to reside at his approved residence since November 9, and (6) failed to report to the CCO as directed on November 10 and 13. The notice outlined the factual basis for the alleged violations and informed the court that Pardo had been terminated from his treatment program and absconded from supervision. The CCO recommended revoking Pardo's SSOSA.

At a scheduled review hearing on November 17, the prosecutor provided all documents to Pardo's attorney, including the violation notice. Because Pardo failed to appear at the hearing, the court issued a warrant. Pardo was taken into custody shortly thereafter.

A few weeks later, the parties appeared in court to address the November 13 violation report and an additional notice of violation filed by the CCO on November 25. The November 25 report alleged that Pardo had (1) unapproved contact with minor children, (2) failed to reside nightly at his approved residence, and (3) failed to report a change of address. All of these violations were reported to have occurred about six months earlier, around April 2009, and were based on the report of a neighbor who lived in a duplex next to Pardo's wife.

The court granted requests by Pardo's counsel for continuances in December 2009 and January 2010. Counsel asserted that more time was necessary to prepare to defend against the allegations, especially since the

State was seeking the sanction of revocation. Counsel explained that the defense was exploring treatment options because Pardo's former treatment provider was unwilling to accept him back into treatment, and the defense's position in advocating for continuation of the SSOSA would be strengthened if a new treatment provider would accept Pardo as a client.<sup>1</sup> Counsel also sought additional time to interview the neighbor upon whose claims the November 25 violation report was based. Defense counsel also asked for Pardo to be on work release, claiming that Pardo's incarceration was a barrier to his acceptance into another treatment program. The trial court denied this request.

Eventually, over the course of several hearings, the court heard testimony from Pardo's former treatment provider, his CCO, his wife's former neighbor, Pardo, and Pardo's father. Based on the evidence, the trial court revoked Pardo's SSOSA. The court was "satisfied" that Pardo committed all but one of the violations alleged in the two violation reports. The court additionally determined that Pardo had failed to make reasonable progress in his sexual deviancy treatment program and had been terminated from treatment. In light of the fact that Pardo had not been accepted by another treatment provider, the court found it was left with no choice but to revoke the SSOSA. And even if it had the discretion to allow Pardo to continue treatment under his SSOSA, the court stated that it would decline to do so in this case.

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<sup>1</sup> See Former RCW 9.94A.670(4)(c) (the court "shall" order sex offender treatment as part of SSOSA).

Pardo appeals.

## NOTICE

Pardo claims that he had no notice of the conditions of his sentence because the Appendix H was omitted from his original judgment and sentence and this deficiency was not cured when the court later filed the document. Pardo also maintains that he did not receive either of the November 2009 written violation reports.

A trial court's decision to revoke a SSOSA suspended sentence is reviewed for an abuse of discretion.<sup>2</sup> A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds.<sup>3</sup> We review alleged due process violations de novo.<sup>4</sup>

The record demonstrates that Pardo had ample notice of the conditions of his sentence. Pardo's CCO testified that he reviewed the conditions set forth in Appendix H with Pardo before he was released from confinement. Moreover, all of the conditions Pardo was accused of violating were also contained either in the judgment and sentence itself, or in the DOC document Pardo signed before his release. Finally, it is undisputed that Appendix H was not originally properly

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<sup>2</sup> State v. Partee, 141 Wn. App. 355, 361, 170 P.3d 60 (2007).

<sup>3</sup> State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009).

<sup>4</sup> State v. Cantu, 156 Wn.2d 819, 831, 132 P.3d 725 (2006); State v. Simpson, 136 Wn. App. 812, 816, 150 P.3d 1167 (2007).

filed with Pardo's judgment and sentence. But that error was corrected many months before Pardo committed the violations at issue when the omission was brought to the attention of the court.

Nor does the record support Pardo's claim that he lacked notice of the violations alleged. Pardo appeared in court on numerous occasions between the issuance of the violation reports in November 2009 and the revocation more than two months later in February 2010. Pardo did not at any point object to the notice provided, nor did he claim surprise, or object to the substance of the testimony presented in support of the allegations. To the contrary, Pardo's counsel's requests for continuances and work release in order to prepare to meet the allegations indicate that the defense was aware of the claimed violations.

It is true that individuals accused of violating the conditions of a SSOSA are entitled to the minimal due process protections, including the right to "written notice of the claimed violations."<sup>5</sup> However, a person accused of violating conditions of sentence bears some responsibility for protecting his minimal due process rights.<sup>6</sup> At a minimum, the accused must notify the court, through an objection, of an alleged violation of due process.<sup>7</sup> An objection is important

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<sup>5</sup> State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999).

<sup>6</sup> State v. Robinson, 120 Wn. App. 294, 297, 85 P.3d 376 (2004).

<sup>7</sup> Id.

because revocation hearings, like most other court proceedings, are time consuming and expensive.<sup>8</sup> An accused such as Pardo may not sit by and let the revocation hearing proceed, see how things turn out, and then assert lack of notice on appeal.<sup>9</sup> By failing to raise the issue of notice despite several opportunities to do so, Pardo waived any claim that his due process right to notice was violated.

### **STANDARD OF PROOF**

Pardo also contends that he was denied due process because the court applied a “reasonable belief” standard instead of a “preponderance of the evidence” standard when it determined that he had violated conditions of his sentence. Pardo concedes that Washington decisions have long held that a SSOSA suspended sentence may be revoked if there is “sufficient proof to reasonably satisfy the court that the offender has violated a condition of the suspended sentence” or failed to make satisfactory progress in treatment.<sup>10</sup> But he argues that the reasonable belief standard is inconsistent with the due

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<sup>8</sup> State v. Naillieux, 158 Wn. App. 630, 638, 241 P.3d 1280 (2010).

<sup>9</sup> See State v. Nelson, 103 Wn.2d 760, 766, 697 P.2d 579 (1985) (defendant could not sit by while his due process rights were violated at a hearing and then allege due process violations on appeal).

<sup>10</sup> State v. McCormick, 166 Wn.2d 689, 705, 213 P.3d 32 (2009); State v. Dahl, 139 Wn.2d at 683; State v. Badger, 64 Wn. App. 904, 908, 827 P.2d 318 (1992).

process protections articulated in Morrissey v. Brewer,<sup>11</sup> because it is a lower standard and fails to ensure that violations are established by verified facts. We disagree.

The Morrissey court did not address burden of proof. The court limited its analysis to “deciding the minimum requirements of due process” and required only six specific enumerated protections, including written notice of the claimed violations.<sup>12</sup> The court only mentioned the burden of proof in remarking upon the state’s interest in “return[ing] the individual to imprisonment without the burden of a new adversary criminal trial.”<sup>13</sup> Morrissey does not require a specific burden of proof, but suggests something less than beyond a reasonable doubt is sufficient. Contrary to Pardo’s argument on appeal, our supreme court has considered the appropriate standard of proof in SSOSA revocation proceedings in light of the standards set forth in Morrissey.<sup>14</sup> The standard applied in this case is consistent with those standards.

Pardo further claims that a preponderance standard should apply because that is the standard used in other analogous contexts, such as Drug Offender Sentence Alternative revocations and community custody violation

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<sup>11</sup> 408 U.S. 471, 484, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).

<sup>12</sup> Id. at 488-89.

<sup>13</sup> Id. at 483.

<sup>14</sup> See McCormick, 166 Wn.2d at 705 (rejecting claim that due process requires proof of willful violation of condition of sentence).



hearings. He argues that there is “no justifiable basis” to distinguish between the violation hearings employing a higher standard and SSOSA revocation hearings. But Pardo cites no authority supporting the position that disparate burdens of proof amount to a violation of due process.

To the extent that Pardo is asserting an equal protection violation his argument is not fully developed and we decline to consider it.<sup>15</sup> Sex offenders are not a suspect class for purposes of equal protection review.<sup>16</sup> To establish an equal protection violation, Pardo must demonstrate that the distinction between SSOSA revocation hearings and other violation hearings lacks a rational basis.<sup>17</sup> Pardo fails to make any such argument here. Accordingly, we adhere to our precedent.

We affirm the trial court’s order revoking Pardo’s SSOSA suspended sentence.

Cox, J.

WE CONCUR:

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<sup>15</sup> See RAP 10.3; Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

<sup>16</sup> State v. Ward, 123 Wn.2d 488, 516, 870 P.2d 295 (1994).

<sup>17</sup> Id.

Jan, J.

Becker, J.