IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,
vs.
CARL LEE HICKS,
Respondent.

CASE NO. 65,495

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

AUTHORITIES CITED

OTHER AUTHORITIES

Constitutional Provisions

Florida Statutes

STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's Statement of the Case and Facts with the following additions:

Respondent's motion to withdraw his admission to the violation of probation set forth the petitioner was sixteen years old and had a ninth grade education. The motion also stated that petitioner had not been convicted of any of the three charges which formed the basis for the affidavit of violation of probation, that serious substantive charges were involved and that fundamental fairness required court-appointed counsel to represent respondent and investigate this complex case (Supplemental Record).

POINTS INVOLVED

POINT I

WHETHER RESPONDENT WAS DENIED FUNDAMENTAL FAIRNESS AND HIS CONSTITUTIONAL RIGHTS TO THE ASSISTANCE OF COUNSEL AND PROTECTION AGAINST SELF-INCRIMINATION AT HIS FIRST HEARING ON THE AFFIDAVIT OF VIOLATION OF PROBATION? (RE-STATED).

POINT II

WHETHER THIS COURT SHOULD ADOPT A PER SE RULE THAT ALL INDIGENT DEFENDANTS ARE ENTITLED TO REPRESENTATION BY COURT-APPOINTED COUNSEL AT VIOLATION OF PROBATION PROCEEDINGS? (RE-STATED).

ARGUMENT

POINT I

RESPONDENT WAS DENIED FUNDAMENTAL FAIRNESS AND HIS CONSTITUTIONAL RIGHTS TO THE ASSISTANCE OF COUNSEL AND PROTECTION AGAINST SELF-INCRIMINATION AT HIS FIRST HEARING ON THE AFFIDAVIT OF VIOLATION OF PROBATION. (RESTATED).

Respondent contended in his direct appeal to the District Court of Appeal, Fourth District, that he was entitled to the benefit of counsel at his revocation of probation hearing under the standard of Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). Even if a per se rule is not adopted by this Court, respondent is entitled to a new revocation of probation hearing where he will be advised of his right to counsel and his due process rights that attend any violation of probation hearing before the circuit court proceeds to elicit any incriminating admissions from him.

The circuit court erred in denying respondent his right to a fundamentally fair probation revocation hearing when the judge refused to inform respondent of his right and entitlement to counsel and his rights against compelled self-incrimination at his probation revocation hearing. Nor did the court inform respondent of the due process rights which attend any hearing to determine whether respondent's probation should be revoked. See Gagnon v. Scarpelli, supra. Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

The circuit court was of the opinion that until the probationer denied the allegations of violation of probation he was not entitled to counsel. However, Gagnon contemplates that the probationer be advised of his right to request counsel and the court determine whether the circumstances require the appointment of counsel before the agency in charge of revocation proceedings, here a circuit judge, attempts to short circuit the proceedings by eliciting an uncounseled and uninformed admission to allegations of serious criminal conduct. 411 U.S. at 790. See also Sanderson v. State, 447 So.2d 374 (Fla. 1st DCA 1984) at 376.

Respondent was not even given an opportunity to retain counsel or told that he could request counsel. Where the government intends to withdraw certain governmental benefits from an individual, he has a right to a fair hearing and must be allowed to retain counsel if he so desires. Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). The circuit court should have at least informed respondent that he could request counsel and determine if, in light of respondent's age of sixteen years and his educational background of only nine years, appointment of counsel was needed to help him determine what plea to answer to the charges. In Gagnon, the court stated that in deciding whether to appoint counsel, the responsible agency (here the circuit judge), should consider whether the probationer appears to be capable of speaking effectively for himself.

In Mempa v. Rhay, 389 U.S. 128,134, 88 S.Ct. 254,257,19 L.Ed.2d 336 (1967), the Court held that the right to counsel

existed "at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected," where the probationer's privately retained counsel had failed to appear at the defendant's probation revocation hearing. In Gagnon v. Scarpelli, supra, the Court held that the right to counsel in all probation revocation proceedings where a sentence was previously imposed is not absolute and that counsel is only required where "fundamental fairness" necessitates that counsel be appointed for indigents. 411 U.S. at 790. Respondent contends that he was entitled to the benefit of counsel even under this less strict standard of Gagnon v. Scarpelli because respondent, an indigent of only sixteen years with a limited educational background, required the presence and assistance of appointed counsel to help him understand the charges, to help him determine whether he should admit or deny the allegations of violation of probation and to render the proceedings fundamentally fair.

The allegations of violation of probation accused respondent of committing serious criminal offenses. These were not technical violations of probation. Respondent had not been convicted of these other criminal charges for which he had been in custody since his arrest on the date of the alleged offenses, February 2, 1983 (Supplemental Record). As such, respondent retained a Fifth Amendment privilege against self-incrimination in these probation revocation proceedings, which privilege was applicable to specific conduct and circumstances concerning a separate criminal offense. State v. Heath, 343 So.2d 13 (Fla. 1977). Under the

circumstances of this case, the circuit court's questioning respondent to determine whether he committed the crimes of sexual battery, armed burglary or grand theft constituted custodial interrogation before which he was entitled to have the Miranda advisory given and to knowingly, voluntarily, and intelligently waive those rights before answering the court's questions. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

The circumstances of the hearing indicate that respondent did not understand the accusations well enough to determine what plea to enter to those allegations without the assistance of counsel. Respondent's answers to the court's request for an admission were confused; when first asked if he denied or admitted the charges respondent answered, "Yes." (R-6). Respondent eventually denied sexual battery of Judi Meyers and theft of Judi Meyers' Ruger pistol but admitted a burglary during which he armed himself with Judi Meyers' Ruger. A denial of stealing Meyers' Ruger is inconsistent with an admission that he armed himself with that same weapon or had an intent to commit theft. Respondent's denial of the grand theft allegations should have been a sufficient basis alone for the circuit court to question whether respondent understood his admission to armed burglary.

Respondent needed counsel to help him determine how to plead to these allegations. Once counsel was appointed, he filed a motion to withdraw the admission requesting that respondent be allowed to deny all three allegations, and setting forth that he

had not been convicted of any of the offenses alleged as violations of probation. Respondent did deny the charges, or at least enough of the charges, to raise some suspicion as to his lack of understanding and confusion regarding the proceedings. Further judicial inquiry before respondent's admission was accepted should be required.

Petitioner concedes that Section 948.06(1) permits the assistance of counsel at revocation of probation proceedings (Petitioner's Brief at 11). Counsel from the law firm which had represented respondent when he was placed on probation on January 31, 1983, the Public Defender's Office of the Seventeenth Judicial Circuit, was present when respondent's first violation of probation hearing was held on February 24, 1983. This Assistant Public Defender protested the court's proceeding without the participation of counsel for respondent but was told not to interrupt. The only reason respondent's counsel was not permitted to assist respondent in initially determining whether he should admit or deny the allegations was respondent's poverty. No private attorney would have been prevented from representing his client under similar circumstances; due process would have allowed counsel's participation. Goldberg v. Kelly, supra. In Mempa v. Rhay, supra, the Court assumed that counsel appointed for the purpose of the trial or guilty plea would not be unduly burdened by being requested to follow through at the deferred sentencing or revocation of probation stage of the proceeding. 389 U.S. at 137. Here, that appointed counsel was present and

ready and willing to assist respondent at this stage of the proceedings, but the circuit court forbade him to participate. This action by the circuit court rendered the proceedings fundamentally unfair, left respondent without accurate advise or knowledge as to how he should answer the court's question and violated his rights to a fair hearing on the substantive allegations against him.

POINT II

THIS COURT SHOULD ADOPT A PER SE RULE THAT ALL INDIGENT DEFENDANTS ARE ENTITLED TO REPRESENTATION BY COURT-APPOINTED COUNSEL AT VIOLATION OF PROBATION PROCEEDINGS. (RESTATED).

In addition to asserting his entitlement to counsel at his revocation of probation hearing under the rule of Gagnon v. Scarpelli, respondent urged the district court to adopt the standard of Smith v. State, 427 So.2d 773 (Fla. 2nd DCA 1983) and Mullins v. State, 438 So.2d 908 (Fla. 2nd DCA 1983), that fundamental fairness required appointment of counsel for indigents at violation of probation hearings. In aligning itself with Smith and Mullins, the district court recognized that a "decision to deprive a probationer of his freedom is as critical as the subsequent imposition of sentence." Hicks v. State, 452 So.2d 606,607 (Fla. 4th DCA 1984). Since revocation of probation proceedings affect a defendant's substantive rights not to have his probation unjustifiably revoked and directly affect whether the defendant will go to prison, appointment of counsel is necessary to ensure reasonable fairness in these proceedings.

There is precious little appointed counsel can do for a probationer at a sentencing hearing once the judge has determined to revoke probation. Practically speaking, the only judicial decision to be made at that point is the length of the prison sentence to be imposed, Section 948.06, Florida Statutes; but the probationer needs the assistance of counsel at the time his substantive rights are affected, at that proceeding where the

judge determines whether a violation is established and whether revocation is necessary or justified.

The district court determined that Gagnon v. Scarpelli did not prohibit its finding that fundamental fairness required adoption of a per se rule for appointed counsel in probation revocation proceedings. Hicks v. State, supra, at 608. The district court found the probation revocation proceedings described in Gagnon substantially different than probation revocation proceedings utilized in Florida. First of all, Gagnon involved a previously sentenced probationer, whose 15 year sentence had been suspended while he was placed on probation. Respondent had not been sentenced at all but placed on probation. The outcome of the revocation proceedings determined whether respondent would be sentenced.

In Gagnon, the revocation proceedings were informal, non-adversarial and held in an administrative, not a judicial forum. In Florida, probation revocation proceedings are held before the same circuit judge who placed the defendant on probation and might be described as a continuation of the sentencing proceedings. A violation of probation proceeding in Florida is an adversary, judicial proceeding where the affidavit of violation is prosecuted in the name of the State of Florida and by an Assistant State Attorney. Hicks, at 608. Section 27.02, Florida Statutes. The state carries the burden of proof in a probation revocation proceeding. Morgan v. State, 352 So.2d 161 (Fla. 2nd DCA 1977).

A probation violation proceeding in Florida is clearly less formal than a criminal trial (see petitioner's citations at page 10) but, nontheless, it is a criminal proceeding. This Court has previously held that certain Rules of Criminal Procedure apply; the criminal discovery rules apply to a violation of probation hearing but their violation without judicial inquiry does not result in the same automatic remedy of reversal, which is applicable in a criminal trial. Cuciak v. State, 410 So.2d 916 (Fla. 1982). Without the assistance of counsel, an accused probationer is without the skill and knowledge to utilize discovery where it is necessary to adequately inform him of the allegations against him.

The Supreme Court found the case by case right to counsel rule of Betts v. Brady, 316 U.S. 455, 86 L.Ed. 1595, 62 S.Ct. 1252 (1942), to be unworkable and a source of controversy and rejected it in Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Similarly, the district court in respondent's case aligned itself with the Second District Court of Appeal in Smith and Mullins and recognized that entitlement to counsel is essential to ensure reasonable fairness in revocation proceedings and rejected a case by case approach. Petitioner calls the district court's decision in respondent's case a return to its pre-Gagnon decision of Gargan v. State, 217 So.2d 578 (Fla. 4th DCA 1969) and a "step back in time." (Petitioner's Brief at page 11). The Hicks decision is more correctly characterized as a return to older, more sound precedents that restore

constitutional principles established to achieve a fair system of justice. It was on this basis that the Supreme Court reconsidered and rejected Betts v. Brady and then returned to its older, well considered precedents that, in our adversarial system of criminal justice, any poor person hailed into court cannot be assured a fair trial unless counsel is provided for him. Gideon v. Wainwright, 372 U.S. at 344.

In Gideon, the Supreme Court then went on to detail why the right to counsel is considered fundamental and essential to a fair trial in our system of justice. Without counsel, a layman could not properly determine for himself if the charge was good or bad, if the state's evidence was competent or relevant to the issue or otherwise inadmissible. The layman was said to lack skill and knowledge to prepare his own defense even if he had a perfect one. 372 U.S. at 345.

The district court did not deviate from fundamental principles of fairness and justice applicable to our adversarial criminal justice system when it determined that the circuit courts were required to respect an indigent's right to counsel to insure fundamental fairness in violation of probation hearings. Of particular importance to the district court was the existence of a number of other cases on appeal where "this same procedure was utilized and admissions of violation were accepted without advising the probationer of this right [to be represented by counsel and to have one appointed if indigent.]" Hicks at 607. In light of the plethora of appeals from revocations of probation

where the circuit court failed to advise an indigent defendant of his right to request counsel or to make any determination of whether counsel was required on a case by case basis, the district court did not err in adopting a per se rule in the present case. (The district court's decision does not run afoul of Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), since this Court has not announced any rule of law regarding the standard to be utilized for appointment of counsel in violation of probation proceedings).

The record of respondent's case demonstrates why guaranteed assistance of counsel appears to be the only method to assure that minimal due process standards are observed in each and every case to insure that a probationer's liberty is not unjustifiably taken away. Here, the circuit judge made no inquiry to determine if respondent wanted to take advantage of the rights that due process affords him at this stage of the proceedings, his right to written notice of the claimed violations, disclosure of the evidence against him, his opportunity to be heard and present witnesses and evidence, his right to confront and cross-examine adverse witnesses against him, his right to a neutral and detached hearing body and a written statement as to the evidence relied on and reasons for revocation. Gagnon v. Scarpelli, 411 U.S. at 786.

Without counsel and without any inquiry from the circuit judge, a probationer may not be capable of speaking effectively for himself, determining what defenses he may have to the

violation of probation allegation, may not ascertain the advantage of joint plea negotiations to dispose of the substantive and violation of probation charges at the same time, nor be aware of other rules applicable to a violation of probation hearing; assistance of counsel would assure that a probationer's rights were observed and possible defenses advanced. Without counsel most probationer's would be unaware that revocation of probation may not be based solely on hearsay, Purvis v. State, 397 So.2d 746 (Fla. 5th DCA 1981), Vila v. State, 375 So.2d 31 (Fla. 3rd DCA 1979); that a technical violation for failure to pay costs or restitution must take into account the probationer's ability to pay, Rodriguez v. State, 405 So.2d 794 (Fla. 2nd DCA 1981), Aaron v. State, 400 So.2d 1033 (Fla. 3rd DCA 1981); that probation may be revoked only for a willful and substantial violation, Shaw v. State, 391 So.2d 754 (Fla. 5th DCA 1980), Blue v. State, 377 So.2d 1016 (Fla. 2nd DCA 1979), Donneil v. State, 377 So.2d 805 (Fla. 3rd DCA 1979), or other rules and defenses applicable in revocation proceedings.

Accordingly, respondent requests that the decision of the District Court of Appeal, Fourth District, be affirmed.

SUMMARY OF ARGUMENT

Under the circumstances of this case, respondent was entitled to be advised of his right to request the assistance of counsel and advised of the applicable due process rights he would waive before the circuit court called on him to make an admission to the allegations of violation of probation. This Court should adopt as the standard for Florida that fundamental fairness requires each and every probationer be afforded the right to counsel at violation of probation proceedings, which, by their nature, are proceedings that affect his substantial rights at sentencing.

CONCLUSION

Based on the foregoing facts and the authorities cited, respondent respectfully requests that the decision of the District Court of Appeal, Fourth District be affirmed and that respondent be afforded a full and fair revocation proceeding at which time he will be afforded his right to be represented by court-appointed counsel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Respondent's Brief on the Merits has been furnished by mail, to CAROLYN V. McCANN, Assistant Attorney General, Counsel for Petitioner, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, FL 33401, this 15th day of January, 1985.

Margaret Good

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