o. a. 3-6-85

STATE OF FLORIDA,

Petitioner,

vs.

CARL LEE HICKS,

Respondent.

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
Petitioner,	)	CASE No. 65,495
vs.	)	
CARL LEE HICKS,	)	
Respondent.	)	

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the appellee in the District Court of Appeal, Fourth District, and the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

The Respondent was the appellant in the Fourth District and the defendant in the trial court.

In the brief, the parties will be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as the State.

The following symbols will be used:

"R" Record on Appeal

"PA" Petitioner's Appendix

All emphasis has been added by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

On January 20, 1982, Respondent was charged by information with burglary of a dwelling (R.45). Respondent entered a plea of guilty and was placed on five years probation with the special condition that he pay $250 as a public defender's fee (R.47-48).

On February 7, 1983, Respondent was charged with violation of probation by committing three offenses: sexual battery, armed burglary and grand theft (R.48).

On February 24, 1983, Respondent had a first hearing on the charge of violation of probation (R.2). The trial judge read the alleged violations and charges forming the basis thereof to Respondent and informed Respondent that at a final hearing the court would determine whether there was a material violation, which could result in a fifteen year sentence and $10,000 fine. Respondent said he understood the allegations of violation, the charges and the possible consequences (R.5). The trial judge then asked Respondent if he admitted or denied the allegations, whereupon an assistant public defender on duty requested appointment of counsel to represent Respondent (R.6). The judge advised counsel he was "out of order" and continued to ask Respondent if he admitted or denied the allegations in the affidavit of violation of probation. Respondent stated that he admitted all three charges (R.6). Thereafter, the judge again read out the charges; Respondent denied two charges, but admitted to the armed burglary (R.7-8).

The court then found that Respondent had materially violated the conditions of his probation, set a sentencing date, and appointed counsel to represent Respondent (R.9-10).

On March 1, 1983, defense counsel filed a motion to withdraw Respondent's admission to the charge of violation of probation based on the fact that he was without counsel at the initial hearing (Supplemental Record).

This motion was heard by the court on March 3, 1983 (R.11). At the conclusion of the hearing, the court set aside the prior finding of a material violation but refused to allow Respondent to withdraw his prior admission (R.24). The court then set the matter for sentencing (R.25).

On March 14, 1983, this cause came on for sentencing. The court made a finding of material violation, revoked Respondent's probation and sentenced him to a term of fifteen years (R.42).

On appeal, the Fourth District Court of Appeal reversed Respondent's order of revocation and remanded for a new revocation proceeding because Respondent was not advised of his right to counsel at the probation revocation proceeding (Appendix). In its written opinion, the Fourth District acknowledged that the First District Court in Sanderson v. State, 447 So. 2d 374 (Fla. 1st DCA 1984), had apparently adopted a different rule than the one applied by the court in resolving the case sub judice. (Appendix).

Petitioner filed its notice to invoke discretionary review on June 21, 1984, and on December 6, 1984, this Honorable Court accepted jurisdiction and issued its briefing schedule.

POINT INVOLVED ON APPEAL

WHETHER THE COURT APPOINTED COUNSEL FOR INDIGENT DEFENDANTS SHOULD BE MANDATORY IN ALL REVOCATION OF PROBATION PROCEEDINGS?

ARGUMENT

COURT APPOINTED COUNSEL FOR INDIGENT DEFENDANTS SHOULD NOT BE MANDATORY IN ALL REVOCATION OF PROBATION PROCEEDINGS.

This issue before this Honorable Court is whether court appointed counsel for indigent defendants is mandatory in all revocation of probation proceedings. The Fourth District Court of Appeal in Hicks v. State, 452 So. 2d 606 (Fla. 4th DCA 1984), has already answered this question in the affirmative and has held that by judicial fiat, all indigent defendants in revocation of probation proceedings must be appointed counsel regardless of the limitations on the right to court appointed counsel set forth by the Supreme Court in Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973). Thus, the Fourth District has, in effect,announced a per se rule for appointment of counsel. Under Gagnon, an indigent probationer is entitled to court appointed counsel during revocation proceedings only when he denied committing the alleged violation of the conditions upon which he is at liberty or when there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present. The Gagnon court stated that the decision as to the need for counsel was to be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with administering the probation system. The Court held:

By the same token, we think that the Court of Appeals erred in accepting respondent's contention that the State is under a constitutional duty to provide counsel for indigents in all probation or parole revocation cases. While such a rule has the appeal of simplicity, it would impose direct costs and serious collateral disadvantages without regard to the need or the likelihood in a particular case for a constructive contribution by counsel. In most cases, the probationer or parolee has been convicted of committing another crime or has admitted the charges against him. And while in some cases he may have a justifiable excuse for the violation or a convincing reason why revocation is not the appropriate disposition, mitigating evidence of this kind is often not susceptible of proof or is so simple as not to require either investigation or exposition by counsel.

The introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding. If counsel is provided for the probationer or parolee, the State in turn will normally provide its own counsel; lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views. The role of the hearing body itself,[1] aptly described in Morrissey as being "predictive and discretionary" as well as factfinding, may become more akin to that of a judge at a trial, and less attuned to the rehabilitative needs of the individual probationer or parolee. In the greater self-consciousness of its quasi-judicial role, the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to reincarcerate rather than to continue nonpunitive rehabilitation. Certainly the decisionmaking process will be prolonged, and the financial cost to the State - for appointed counsel,

FOOTNOTE 1

1 Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct 2593, 33 L. Ed. 484 (1972)

counsel for the State, a longer record, and the possibility of judicial review will not be insubstantial.

In some cases, these modifications in the nature of the revocation hearing must endured and the costs borne because, as we have indicated above, the probationer's or parolee's version of a disputed issue can fairly be represented only by a trained advocate. But due process is not so rigid as to require that the signficant interests in informality, flexibility, and economy must always be sacrificed.

In so concluding, we are of course aware that the case-by-case approach to the right to counsel in felony prosecutions adopted in Betts v. Brady, 316 U.S. 455 62 S. Ct. 1252, 86 L. Ed. 1595 (1942), was later rejected in favor of a per se rule in Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). See also Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972). We do not, however, draw from Gideon and Argensinger the conclusion that a case-by-case approach to furnishing counsel is necessarily inadequate to protect constitutional rights asserted in varying types of proceedings: there are critical differences between criminal trials and probation or parole revocation hearings, and both society and the probationer or parolee have stakes in preserving these differences.

In a criminal trial, the State is represented by a prosecutor; formal rules of evidence are in force; a defendant enjoys a number of procedural rights which may be lost if not timely raised; and, in a Jury trial, a defendant must make a presentation understandable to untrained jurors. In short, a criminal trial under our system is an adversary proceeding with its own unique characteristics. In a revocation hearing, on the other hand, the State is represented, not by a prosecutor, but by a parole officer with the orientation described above; formal procedures and rules of evidence are not employed; and the members of the hearing

body are familiar with the problems and practice of probation or parole. The need for counsel at revocation hearings derives, not from the invariable attributes of those hearings, but rather from the pecularities of particular cases.

The differences between a criminal trial and a revocation hearing do not dispose altogether of the argument that under a case-by-case approach there may be cases in which a lawyer would be useful but in which none would be appointed because an arguable defense would be uncovered only by a lawyer. Without denying that there is some force in this argument, we think it a sufficient answer that we deal here, not with the right of an accused to counsel in a criminal prosecution, but with the more limited due process right of one who is a probationer or parolee only because he has been convicted of a crime.

We thus find no justification for a new inflexible constitutional rule with respect to the requirement of counsel. We think, rather, that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system. Although the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness - the touchstone of due process- will require that the State provide at its expense counsel for indigent probationers or parolees.

It is neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable

> due process requirements. The facts and circumstances in preliminary and final hearings are susceptible of almost infinite variation, and a considerable discretion must be allowed the responsible agency in making the decision. Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present. In passing on a request for the appointment of counsel, the responsible agency aslo should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself. In every case in which a request for counsel at a preliminary or final hearing is refused, the grounds for refusal should be stated succinctly in the record.

411 U.S. at 787-91, 93 S.Ct. 1762-64, 36 L. Ed. 2d 664-67. In so holding, the Court limited its prior holding in Mempa v. Rhay, 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967), to the proposition that an indigent probationer is entitled to appointed counsel at sentencing even if this occurs at the same hearing in which probation is revoked.

Petitioner submits that the per se rule announced by the Fourth District is Hicks, supra, is inconsistent with Gagnon, and should not be adopted by this Honorable Court. Petitioner maintains that the standards for appointment of counsel to indigent probationers as set forth by the Supreme Court in Gagnon, are the standards which should be followed by the courts of this state. In deciding this issue it is

important to keep in mind the distinction between a trial and a revocation hearing. In a probation revocation hearing, the probationer has already been convicted of a crime and he is at liberty because of judicial grace, so he is not entitled to remain at large after having violated the terms of his probation. Bernhardt v. State, 288 So. 2d 496 (Fla. 1974). Because the revocation concerns an already established criminal offense, a probationer is not afforded many of the constitutional rights guaranteed a criminal defendant, inter alia: he has no right to a jury trial,[2] no right to a speedy trial under our criminal rules,[3] he can not claim a Fifth Amendment privelege as to non-criminal conduct,[4] if he remains silent, his silence can be considered by the trial judge,[5] he has no right to bail pending the revocation hearing,[6] and if the conduct constituting the violation is a criminal offense for which he is acquitted by a jury, the acquittal does not bar revocation under double jeopardy principles.[7] Thus a probationer facing revocation must be afforded minimal due process only and he is not entitled to the same guarantees as a defendant facing criminal prosecution.

FOOTNOTES 2,3,4,5,6,7

2 Singletary v. State, 290 So. 2d 116 (4th DCA Fla.1974) cert. dism. 293 So. 2d 361

3 Young v. State 305 So. 2d 307 (3d DCA Fla. 1974)

4 State v. Heath, 443 So. 2d 396 (Fla. 1977), cert. denied 434 U.S. 983; Holmes v. State, 311 So. 2d 780 (3d DCA Fla. 1975).

5 State v. Mangam, 343 So. 2d 599 (Fla. 1977).

6 Genung v. Nuckolls, 292 So. 2d 587 (Fla. 1974).

7 Russ v. State, 313 So. 2d 758 (Fla. 1975), cert. denied 423 U.S. 924; Borges v. State, 249 So. 2d 513 (3d DCA Fla. 1971).

If all of these constitutional rights accorded a criminal defendant are limited in their application to a probationer, it simply does not follow that "minimal due process" contemplates a per se rule requiring appointment of counsel to all indigent probationers in revocation of probation proceedings. The applicable statute in this state, §948.06(1), Fla. Stat., does not require appointment of counsel to indigent probationers during revocation proceedings. Rather, §948.06(1) only permits the assistance of counsel. Likewise, the courts of this state have also recognized the principles set forth in Gagnon, supra, that a probationer does not have a right to appointed counsel at probation revocation proceedings unless "special circumstances" are present. Sanderson v. State, 447 So. 2d 374 (Fla. 1st DCA, 1984); Grandin v. State, 421 So. 2d 803 (Fla. 3d DCA, 1982). In Sanderson, supra, the First District expressly declined to adopt a per se rule requiring appointed counsel for indigent probationers and instead held that the determination regarding the need for appointed counsel should be made on a case by case basis. Petitioner maintains the correctness of the First District's decision in Sanderson, supra and submits that it is the position this Honorable Court should adopt.

In its opinion in Hicks, supra, the Fourth District aligned itself with the position taken by the Second District in Smith v. State, 427 So. 2d 733 (Fla. 2d DCA 1983), which similarly adopted a per se rule for appointment of counsel. By holding as it did in Hicks, supra, the Fourth District receded from its earlier holding in Thompson v. State, 413

So. 2d 1301 (Fla. 4th DCA 1982) which recognized that the Gagnon exception to the right to appointed counsel was limited to instances in which the defendant has been convicted of the crime which constituted the probation violations or cases in which the defendant admitted the violation. The Fourth District has now apparently re-adopted its pre - Gagnon decision of Gargan v. State, 217 So. 2d 578 (Fla. 4th DCA 1969) where it held that a probationer was entitled to counsel at a hearing held to determine whether his probation should be revoked. Thus, the Fourt District has seemingly taken a step back in time.

The reasons given by the Fourth District for its holding in Hicks, supra,were threefold and will be addressed by this Petitioner individually.

The first reason given by the Fourth District was that a per se rule would be fairer than Gagnon. Petitioner submits that it is not for the Fourth District Court of Appeal to determine the fairness of the U.S. Constitution. So long as the Constitution does not require otherwise, whether or not a rule is fair is a matter for the Florida Legislature, as the spokepersons for the citizens of Florida. The Legislature has never said that every indigent probationer is entitled to court appointed counsel. See §948.06(1). Petitioner submits that the Legislature, not the Fourth District Court of Appeal, should make the ultimate determination as to how tax dollars should be spent as long as minimum due process requirements

are observed. Petitioner further submits that until the Legislature properly decides this issue, the determination as to whether to appoint counsel should be done on a case-by-case basis in accord with Sanderson, supra.

The second reason given by the Fourth District was that Gagnon was decided in the probation violation framework of an administrative proceedings rather than judicial proceeding, therefore its basis upon the cost to taxpayers is not binding, Florida having adopted a judicial, not administrative method for determining violations. Petitioner submits that the well-reasoned and thoughtful concurring opinion of Judge Glickstein in Hooper v. State, 452 So. 2d 611 (Fla. 4th DCA 1984), which was reversed on the authority of Hicks, supra, is responsive to this particular point:

> I find a number of flaws in this argument. First, the Hicks panel has added to the taxpayers' obligation the potential expense of providing every indigent probationer with counsel. It does so, knowing the existence of cost increase being occasioned by adding to the obligations of public defender staffs, but without any knowledge as to the extent of the cost increases, because (a) a court is not equipped to take testimony as would a legislative committee; and (b) the record in Hicks is obviously void of any cost data. Second, the Supreme Court in Gagnon had before it the applicable statutes in every state and was well aware of the fact that some states used judicial proceedings and other administrative; so the Court's discourse on administrative agency hearings as a rationale for its holding is eye-wash. Nowhere in the opinion is there a statement that the Court was making a rule that applied only to an administrative framework.

> Third, the Court expressly recited that a probation revocation proceeding is not a criminal trial, and it laid out basic distinctions between the two. That should be a red flag to this court that the Court intended judicial revocation and administrative revocation to be treated equally. Fourth, the Hicks' opinion by fixing onto the distinction between admnistrative v. judicial conveniently ignores the balance of the opinion, which convenience does not make for fair evaluation of the rule adopted in Gagnon. Fifth, there cannot be 50 separate constitutional rules under the Federal Constitution for revocation proceedings simply because there may be 50 separate ways to revoke probation in the several states. Sixth, the Hicks opinion does not mention that in Florida there is a combination of administrative and judicial personnel involved in probation violations; and that violation is initiated by administrative personnel. Seventh, when does the judicial system submerge under the weight of its self-imposed burden? A debate of this matter in the Legislature would seem logical, where the "per se" rule could be perceived vis a vis the criminal justice system. Specifically, the elected representatives would decide whether the system should be further clogged with additional proceedings that are not constitutionally required to protect individuals on probation by grace after committing a criminal offense.

452 So. 2d at 617-618.

The third and last reason given by the Fourth District was that a per se rule tends to reduce uncertainty and enhance consistency. Petitioner submits that nowhere in the Fourth District's opinion in Hicks, supra, is there any support for this assertion. Rather, the position which the Fourth District advocates, "reduces the likelihood of efficient, speedy determinations and enhances the cost and complication of justice without judicial or statutory authority therefor."

Hooper, supra, at 618.

Thus, Petitioner maintains that the question of whether all indigent probationer should be appointed counsel in probation revocation proceedings is a matter for the Legislature to decide and until the Legislature and the citizens of Florida answer that question, the determination should be made by the courts on a case-by-case basis.

Regarding the facts of the instant case, Petitioner submits that under Gagnon, supra, Sanderson, supra, and Thompson, supra, Respondent was not entitled to court appointed counsel during his revocation of probation proceedings. At his first hearing, Respondent clearly admitted to the Court that he violated his probation, therefore he was not entitled to counsel. Once Respondent made this admission, the trial court deferred as to whether the Respondent's probation would be revoked (R.10). Thereafter, an attorney was appointed to represent Respondent at the final hearing and sentencing. Clearly, Respondent was not deprived of his constitutional right to the assistance of counsel.

Petitioner maintains that court appointed counsel for indigent defendants should not be mandatory in all revocation of probation proceedings. Rather, this Court should adopt the rule of law announced in Sanderson, supra,as the law of this State.

CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities cited herein, Petitioner respectfully requests that the Judgment and Sentence of the trial court be affirmed, and the decision of the Fourth District Court of Appeal be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the Petitioner's Initial Brief on the Merits has been furnished to MARGARET GOOD, ESQUIRE, Assistant Public Defender, 224 Datura Street/13th Floor, West Palm Beach, Florida 33401 by mail/courier, this 26th day of December, 1984.

Penny H. Brill
OF COUNSEL