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6/A 2-7-91

IN THE SUPREME COURT OF FLORIDA

RAYMOND EUGENE CLARK,

Petitioner,

vs.

Case No.76,006

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENTS BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

BRENDA S. TAYLOR
Assistant Attorney General
Florida Bar ID 0778079
Criminal Division
Westwood Center, 7th Floor
2002 North Lois Avenue
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR RESPONDENT

BST/srr

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SUMMARY OF THE ARGUMENT

It is well settled that a defendant may waive his rights, irrespective of their source. In the case at bar, Petitioner, in order to avoid violating community control, requested a modification of his community control and waived his right to a hearing and assistance of counsel on the modification. The only reason that an indigent community controllee/probationer is entitled, under some circumstances, to court-appointed counsel is because it results in the loss of his liberty. However, when a condition of the community control/probation is amended, the community controllee/probationer's loss of liberty is usually not affected and at most only has restrictions placed on it. Thus, an indigent community controllee/probationer is not entitled to court-appointed counsel short of a revocation hearing. Assuming, arguendo, that an indigent community controllee/probationer may be entitled to court-appointed counsel at a proceeding short of revocation, the need for such counsel should be determined on a case-by-case basis. In the case at bar, there clearly was no need for court-appointed counsel because Petitioner when requesting the modification waived his rights to assistance of counsel.

ARGUMENT

ISSUE

WHETHER THE SECOND DISTRICT COURT OF APPEAL PROPERLY FOUND THAT THE TRIAL COURT WAS JUSTIFIED IN MODIFYING APPELLANT'S COMMUNITY CONTROL WHEN APPELLANT SIGNED A WAIVER OF RIGHTS AND MOTION TO MODIFY COMMUNITY CONTROL.

Petitioner contends that the modification of the conditions of Petitioner's community control was illegal. Respondent respectfully disagrees with Petitioner's implicit argument that a defendant cannot waive a hearing and right to counsel,[1] when a trial court modifies the conditions of his community control even when the modification is requested and there is a written consent and waiver.

It is well settled that a defendant may waive his rights, irrespective of their source. For example, even though former Section 941.01, Florida Statutes (1941) compelled the presence of the defendant at every critical stage in a prosecution for a felony, the Florida Supreme Court has stated that "a statute such as [this] is for the benefit of the defendant and may be waived by him, especially where the offense charged is less than capital." Mulvey v. State, 41 So.2d 156 (Fla. 1949).

In the case at bar, Petitioner requested the modification of the condition of his community control because he did not have a suitable place to live. (R11) Significantly, Petitioner's

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[1] Respondent assumes for the sake of argument in this portion of the brief that an indigent defendant is entitled to counsel during a modification hearing. However, Respondent asserts that an indigent defendant is not entitled to counsel at a modification hearing and addresses this issue infra.

request for the modification was done so that Petitioner could comply with the original court order of community control which requires that Petitioner have a residence. The request for modification was made so that Petitioner would not violate the terms of the original order of community control. Therefore the trial court expressly complied with Petitioner's request. The written waiver is tailored to waive only those rights associated with the instant modification. Petitioner waived "...a public hearing on this modification and "the effective assistance of legal counsel for his defense at any hearing on this modification." [emphasis supplied] (R11)

Petitioner cites Holcombe v. State, 553 So.2d 1337 (Fla. 1st DCA 1989); Ford v. State, 553 So.2d 1340 (Fla. 1st DCA 1989) and Dover v. State, 558 So.2d 101 (Fla. 1st DCA 1990). In Holcombe, Ford, and Dover the defendants signed forms which acknowledged violation of their community control/probation and waived notice and hearing on the violation and modification of community control/probation. In all three cases the First District Court of Appeal held that a defendant could not waive the notice and hearing required under Section 948.06 Fla. Stat. (1987) when his probation or community control is modified. However, as Petitioner acknowledges, the requirements of Section 948.06 Fla. Stat. (1987) do not apply in the present case because Petitioner signed the waiver before a violation of community control was filed.

The following cases, which are cited by Petitioner, can be distinguished from the present case: Anderson v. State, 444

So.2d 1109 (Fla. 3rd DCA 1984); Carter v. State, 516 So.2d 331 (Fla. 1st DCA 1987); Gurganus v. State, 391 So.2d 806 (Fla. 5th DCA 1980). Unlike the case at bar, none of the above cases involved a request for modification and written waiver of rights. In addition, unlike here, none of the above cases involved the amendment to an existing order of community control.

Anderson addressed the issue of the addition of a condition to the probation order, as opposed to the amendment of an existing community control order. Carter, and Gurganus involved an extension of the length of the probationary period itself, whereas the case at bar involves the addition of a slightly more onerous burden to be complied with during the community control period. It should be noted that Section 948.03(7), Florida Statutes (1987) authorizes the trial court to modify at any time a condition theretofore imposed by it upon the probationer, as was done in the case at bar. In Carter, unlike here, there was no written request for modification and waiver of rights, only an agreement with the probation officer to extend the length of the probationary period and a court order which apparently reflected the agreement. In Gurganus, unlike here, there was "no showing [of a] knowing, intelligent, and voluntary waiver, properly made and before the court." The only evidence of such a waiver was the probation officer's testimony that appellant told her he agreed to an extension of his probation in lieu of a revocation hearing. Id. at 807. In the instant case there was a request for modification and written waiver of rights. Accordingly Petitioner's first argument is without merit.

Petitioner also claims that the modification of his community control resulted in a double jeopardy violation. Respondent asserts that Petitioner was not subjected to a second punishment. The trial judge merely amended the order of community control to add a condition at Petitioner's request. Petitioner cites Anderson supra, which holds that a defendant is subjected to double jeopardy when there is no record basis for modifying the terms of probation. Id. at 1110. In the instant case the waiver of rights and motion to modify community control signed by Petitioner provides a record basis for the modification. Accordingly Respondent respectfully disagrees with Petitioner's contention that he was entitled to court-appointed counsel at the modification proceeding.

Finally, Petitioner argues that he was entitled to counsel when pursuant to his request his community control was modified. Respondent respectfully disagrees.

In Florida, indigent probationers are entitled to court-appointed counsel in all probation revocation proceedings. In State v. Hicks, 478 So.2d 22, 23 (Fla. 1985), this Court stated, "[U]nless there has been an informed waiver thereof, [a person subject to probation revocation] is entitled to counsel, and it must be afforded him before he is required to respond in any manner to the revocation charges."[2]

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[2] Petitioner cites Hicks for the proposition that an indigent defendant has the right to counsel at a probation revocation and modification hearing. However, this Court in Hicks addresses only the right to counsel in a probation revocation hearing.

Respondent asserts that an indigent defendant's entitlement to court-appointed counsel at a revocation hearing, does not likewise entitle him to such counsel when a condition to his community control/probation order is amended.

"Probation revocation, like parole revocation, is not a stage of criminal prosecution, but does result in a loss of liberty." Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656, 661-662 (1973). This is the primary reason why the federal constitution affords an indigent community controllee/probationer, under some circumstances, court-appointed counsel at a revocation hearing. A revocation order usually results in the imposition of a prison sentence and the defendant's complete loss of his liberty. However, when a condition of the community control/probation is amended, the community controllee/probationer's loss of liberty is usually not affected and at most only has restrictions placed on it. A mere restriction on one's liberty pales in comparison to the total loss of that liberty. In view of this difference, Respondent respectfully submits that an indigent community controllee/probationer is not entitled to court-appointed counsel short of a revocation proceedings.

If this Court disagrees, Respondent respectfully submits that the need for counsel should be made on a case-by-case basis in the exercise of the sound discretion of the trial court. The reasons which supported the adoption of a per se rule in State v. Hicks, supra, are not applicable in a proceeding short of a revocation hearing.

First, the prosecutor is generally not involved in community control proceedings short of revocation. Instead, it is the probation officer who fulfills this role.

Second, it is true that the trial judge is the decision maker with respect to all decisions affecting the community control order, and not just its revocation. However, as long as lawyers are not involved, the trial judge will be more attuned to the rehabilitative needs of the defendant, since this necessarily will be the focus of any discussions, revocation not being an option at this stage.

Third, the cost involved would be appreciable, for unlike a revocation hearing which necessarily results in a sentencing hearing and the appointment of counsel for that hearing, in a proceeding short of revocation, sentencing is never an issue.

Fourth, it is true that a per se rule tends to reduce uncertainty and enhance consistency in the decisions. However, this is only one factor which must be weighed together with all of the other factors.

Short of a revocation proceeding, the probation officer's goal is to help the defendant reintegrate into society as a constructive individual. It is only when the probation officer decides to recommend revocation that his attitude may sufficiently change so as to place the community controlee/probationer at risk of being treated unfairly.

Assuming, arguendo, that there are circumstances compelling the appointment of counsel in a proceeding short of revocation, they are not present here. As stated above Petitioner when

requesting the modification of his community control waived his right to assistance of counsel pursuant only to the instant modification.

Therefore, Respondent respectfully submits that Petitioner was not entitled to court-appointed counsel at this stage of the process.

Accordingly Respondent asserts that the well-reasoned decision of the Second District Court of Appeal should be upheld.

CONCLUSION

Based on the foregoing argument, citations of authority and references to the record, the decision of the Second District Court of Appeal should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

PEGGY A. QUINCE
Assistant Attorney General
Florida Bar ID 261041

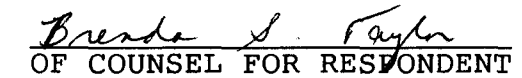
BRENDA S. TAYLOR
Assistant Attorney General
Florida Bar ID 0778079
Criminal Division
Westwood Center, 7th Floor
2002 North Lois Avenue
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to STEPHEN KROSSCHELL, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000-Drawer PD, Bartow, Florida, 33830 on this 19th day of December, 1990.

PEGGY A. QUINCE



OF COUNSEL FOR RESPONDENT