IN THE COURT OF APPEALS OF IOWA

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5-268
84-821

STATE OF IOWA,

Plaintiff-Appellee,

vs.

ROBERT ALLEN WILSON,

Defendant-Appellant.

Appeal from the Iowa District Court for Linn County - John F. Siebenmann, District Associate Judge.

Defendant appeals with permission from the order revoking his probation. AFFIRMED.

Charles Harrington, Appellate Defender, and B. John Burns, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Lona Hansen, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Schlegel and Sackett, JJ.

SACKETT, J.

Defendant Robert Allen Wilson was given a deferred judgment and placed on two years' probation after his guilty plea to third degree theft. Two days before his probation was to end, a report of a violation and an application for revocation of his probation was filed. Approximately two weeks later, after his probationary period had expired, his probation and deferred judgment were revoked and he was sentenced to a term not to exceed two years.

Defendant challenges the authority of the district court to revoke his probation claiming the court's jurisdiction ended when the term of probation expired. Defendant urges us to determine a probationer is automatically discharged when the probationary period ends and no further judicial action is necessary.

This is an issue which has not been considered in Iowa. We look to other jurisdictions in our analysis. The majority of states have determined that the trial court can revoke probation after the probationary period expires, either under the theory the court's jurisdiction continues for a reasonable period of time or the filing of revocation proceedings before expiration tolls the running of the time period. See e.g. In re Griffin, 67 Cal.2d 343, 345-47, 431 P.2d 625, 627-29, 62 Cal. Rptr. 1, 3-5 (1967)(although court loses jurisdiction following expiration of probationary period, court could revoke ex parte at any time prior and set hearing following expiration); State v. Berry, 287 Md. 491, 500-01, 413 A.2d 557, 563 (1980)(revocation of defendant's probation was valid even though arrest warrant and hearing held over two years after expiration and defendant failed to allege prejudice); State v. White, 193 Neb. 93, 94, 225 N.W.2d 426, 427 (1975)(revocation proceeding may be instituted within probationary period or reasonable time thereafter); Decker v. State, 209 N.W.2d 879, 885 (N.D. 1973)(trial court retained

jurisdiction to revoke probation after expiration of probationary term where defendant failed to make restitution within the probation period); Thompson v. State, 620 P.2d 422, 423-24 (Okla. Crim. App. 1980)(filing of motion to revoke one day before expiration and hearing five months later was within court's jurisdiction); Avance v. Mills, 495 P.2d 828, 831 (Okla. Crim. App. 1972)(filing of application to revoke suspended sentence vests court with jurisdiction beyond period of probation and is not defeated by defendant's seeking continuance beyond that period); State ex rel. Cox v. Department of Health & Social Services, 105 Wis.2d 378, 380, 314 N.W.2d 148, 149-50 (Wis. Ct. App. 1981)(issuing of probation violation warrant tolls running of the term); see generally Annot., 13 A.L.R. 4th 1240 (1982).

Other jurisdictions, however, have determined the revocation process must be completed prior to the expiration of the probation period, because at that time the court loses jurisdiction of the probation matter. See e.g. Keller v. Superior Court of Maricopa, 22 Ariz. App. 122, 124, 524 P.2d 956, 958 (1974)(court without jurisdiction to revoke probation after expiration of probationary period, even though proceedings instituted before); Commonwealth v. Smith, 266 Pa. Super. 234, 238, 403 A.2d 1326, 1328 (1979) (revocation hearing 11 months after expiration of probation term violated defendant's right to speedy hearing); Cook v. Commonwealth, 211 Va. 290, 293, 176 S.E.2d 815, 818 (1970)(where defendant was not present at hearing and had no notice, extension of probation was invalid); State v. Mortrud, 89 Wash.2d 720, 724, 575 P.2d 227, 229 (1978)(court without authority to revoke once probation had expired); see generally Annot., 13 A.L.R. 4th 1240 (1982).

We look not only to the rationale underlying the position of our sister states, but also to the legislative intent and the goals to be promoted by the relevant Iowa statutes.

Defendant urges us to adopt the minority view and to require the revocation to be completed before the set term of probation has expired. He relies, for his argument, on Iowa Code section 907.9 (1985) which provides:

> Discharge from probation. At any time that the court determines that the purposes of probation have been fulfilled, the court may order the discharge of any person from probation. At the expiration of the period of probation, in cases where the court fixes the term of probation, the court shall order the discharge of such person from probation, and the court shall forward to the governor a recommendation for or against restoration of citizenship rights to such person. A person who has been discharged from probation shall no longer be held to answer for his or her offense . . . .

This section, defendant contends, changes the prior law which allowed revocation at any time, without limitation, see Iowa Code section 247.26 (1975), and requires the revocation proceeding to be completed before the probationary period ends or the person must be discharged.

Section 907.9 cannot be considered alone. The dual purposes of probation, as set out in Iowa Code section 907.6 (1985), are to promote "rehabilitation of the defendant" and "protection of the community." The legislature has given the courts broad discretion in probation matters, subject only to the requirement that the grant shall rehabilitate the defendant and protect the community. State v. Darrin, 325 N.W.2d 110, 112 (Iowa 1982).

Probation revocation proceedings are governed by Iowa Code section 908.11 (1985). Brown v. State, 297 N.W.2d 101, 102 (Iowa 1980). Section 908.11 provides in relevant part:

> If the violation is established, the court may continue the probation with or without an alteration of the conditions of probation, or may revoke the probation and require the defendant to serve the sentence imposed or any lesser sentence, and, if imposition of sentence was deferred, may impose any sentence which might originally have been imposed.

There is no statutory requirement that the revocation be completed before the probation term expires. The legislature also did not intend to limit the discretion

of the court in carrying out the main objectives of probation. Darrin, 325 N.W.2d at 113.

"[I]t is a fundamental condition of any probation . . . that the probationer shall not violate the law." State v. McGinnis, 243 N.W.2d 583, 587 (Iowa 1976). If we were to agree with defendant and hold that once his term of probation ended, he was automatically discharged, we would effectively be shortening the term of probation. Toward the end of probation, a defendant would be free to violate the law or terms of his probation knowing it would be virtually impossible for the state to institute and complete revocation proceedings before the probation expires. See Keller at 124, 524 P.2d at 958; but see Mortrud at 724, 575 P.2d at 229.

We must not forget, however, defendant's right to complete his probation period satisfactorily and be released. Likewise, a long delay and unreasonable threat of revocation deprives defendant of fundamental due process rights. United States v. Strada, 503 F.2d 1081, 1084 (8th Cir. 1974). The state must make reasonable efforts to institute revocation proceedings, give notice to defendant and conduct a hearing promptly. See Commonwealth v. Ward, 15 Mass. App. 388, ___, 445 N.E.2d 1094, 1096 (1983); Berry at 500, 413 A.2d at 562-63.

The intent of the legislature was to allow the trial court broad discretion in all probation matters, from the grant of probation, throughout its term, to a revocation or discharge. Granting probation to a criminal defendant "is a matter of grace, favor of forbearance with broad discretion resting in the trial court." State v. Noonan, 246 N.W.2d 236, 237 (Iowa 1976).

We determine the dual objectives of probation will best be served by allowing the court's jurisdiction to continue beyond the time the probationary period expires when the violation occurs before, provided the revocation is

completed within a reasonable time. What is reasonable will depend on the facts and circumstances in each case. In this instance where an application was filed two days prior to the probation expiration and hearing was held 15 days later, the time period is reasonable. Defendant had notice of the revocation proceedings prior to the completion of his probationary term. He was not unduly prejudiced by the 2-week extension. The trial court retained jurisdiction to revoke defendant's probation.

AFFIRMED.

All judges concur except Schlegel, J., who dissents.

SCHLEGEL, J. (dissenting)

I respectfully dissent.

Without question, the probation of this defendant should have been revoked. It should have been revoked in October 1982, when the original revocation petition was dismissed on motion of the county attorney in the process of a plea bargain on another crime committed by this defendant. Because it wasn't, the defendant was technically on probation, although he was a prisoner at the Iowa State Penitentiary at Ft. Madison. Later he was paroled from that institution, and his parole was supervised by someone different than the probation officer to whom he had been assigned in connection with the offense involved in this matter. His parole was revoked and he was returned to the penitentiary to serve out his sentence of not to exceed five years. Once again, his probation status was not changed.

Suddenly, when the probation granted under the deferred judgment entered on April 8, 1982, was two days from expiration, a report of violation of probation was filed and hearing for revocation was recommended. On April 10, 1984 (two days after probation had expired), an order was filed setting the "State's Application for Revocation of Probation" for hearing on the 24th day of April, 1984.

Defendant was transported from Ft. Madison to the Linn County jail for the hearing, which was held on April 21, 1984. Probation was revoked as a result of that hearing and defendant was sentenced to a term not to exceed two years, to be concurrent to any other sentence being served.

While I agree with much of the majority's reasoning, I believe the court in this case lost jurisdiction to revoke the probation or to carry out any act but to order the discharge of the defendant from probation. The department of corrections services agent, by merely filing a report of violation, should

not be empowered to toll the effect of section 907.9, which states, in relevant part:

> At the expiration of the period of probation, in cases where the court fixes the term of probation, the court shall order the discharge of such person from probation .... (Emphasis added.)

The last event which served as a basis for revocation of defendant's probation occurred on or about January 3, 1984, when he was convicted of theft in the fifth degree. The Application for Revocation of Probation and the Report of Violation, filed April 6, 1984 (two days before defendant's probation would have been considered finished), alleged violations as far back as June 1, 1982. While the defendant will likely languish in the penitentiary a sufficient time on other charges so that he will complete the two years of this charge at the time of completion of the other charges for which he is incarcerated, the principle that violations of probation may be held in abeyance until just before release from probation is required, and then a petition for revocation may be heard after the discharge is mandated, clothes the prosecutor and corrections officials with oppressive authority and should not be permitted. In this case, grounds for revocation of defendant's probation and deferred judgment, and the imposition of sentence, existed upon numerous occasions before January 1984, but that "ace in the hole" was held by the prosecutor and corrections services until probation was two days away from expiration. Finally, just two days before probation would have expired, the application was filed for an offense that was fully three months old.

Looking at the defendant's youthful record and the record compiled since the first disposition in this case, it is difficult to become overly concerned with the possibility that seeking revocation in this case, and its concomitant extension of defendant's controlled existence for an additional two years, is inappropriate. However, to clothe a prosecutor with the power to treat a deferred judgment

in the manner it has been used in this case places an oppressive power in his hands which may affect all probationers, regardless of the degree of their guilt. The result in this case has been to enable the prosecutor to exercise control over the freedom of the defendant for an extended period of time and distort the purposes of probation as the same are set out in sections 907.5 and 907.6 of the Iowa Code.

I would reverse the trial court's revocation of probation and sentence and remand the case for entry of an order discharging the defendant from probation by reason of his completion of the term thereof.