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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

LESLIE SHEPPARD,

Petitioner-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

Filed October 21, 1980

0-104
2-63349

Appeal from Black Hawk District Court - Forest E. Eastman, Judge.

Petitioner appeals from lower court's denial of postconviction relief asserting due process deficiencies in his probation revocation proceedings and ineffective assistance of counsel at both his trial and his probation revocation hearing. REVERSED AND REMANDED WITH DIRECTIONS.

W. H. Gilliam of Gottschalk & Gilliam, Cedar Falls, Iowa, for petitioner-appellant.

Thomas J. Miller, Attorney General of Iowa; Lona Hansen, Assistant Attorney General; and David H. Correll, Black Hawk County Attorney; for respondent-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

JOHNSON, J.

Petitioner, Leslie Sheppard, appeals from the lower court's denial of postconviction relief asserting due process deficiencies in his probation revocation proceedings and ineffective assistance of counsel at both his trial and probation revocation hearing. We reverse and remand for a limited hearing.

Petitioner was convicted of false drawing and uttering by jury verdict on October 16, 1975. He was given a seven-year sentence to the men's reformatory at Anamosa on October 16, 1975, but trial court suspended his sentence and placed him on probation. In concurrence with his attorney, plaintiff decided against a direct appeal of the conviction.

On March 12, 1976, a probation violation report was filed against petitioner for false drawing and uttering of a check. Following the preliminary hearing, revocation proceedings were cancelled. Petitioner's probation was reinstated under stricter conditions. Trial counsel represented the petitioner during these proceedings.

A second probation violation report was filed on October 12, 1976, after petitioner was arrested for OMVUI and possession of a controlled substance. Following the preliminary hearing, the hearing officer found probable cause of petitioner's probation violation. The final revocation hearing was held November 5, 1976. On November 8, 1976, Dr. Spencer, a treating psychiatrist at the Black Hawk County Mental Health Center in Waterloo, sent the judge a letter, favorable to petitioner, outlining new community treatment possibilities for petitioner. The court entered an order taking the case under advisement pending receipt of a report from the Department of Court Services assessing feasibility of the new treatment program in petitioner's case. The Department of Court Services' report to the court, dated November 15, 1976, recommended revocation of petitioner's probation. On January 7, 1977, the court ruled on the claimed violations, revoked petitioner's probation, and ordered petitioner to serve the seven-year sentence originally imposed. Trial counsel represented petitioner throughout these revocation proceedings; however, neither petitioner nor counsel appeared in court on January 7, 1977, when trial court entered its order.

Petitioner filed his petition for postconviction relief on October 5, 1978. Hearing was held on February 3, 1979, wherein petitioner was represented by present appellate counsel. The lower court denied petitioner's application on March 14, 1979. This appeal followed.

I. Scope of Review. Our review of postconviction rulings under section 663A.9, The Code 1979, is generally on error and not de novo. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). We will not disturb trial court's judgment where the findings of fact in support of its judgment denying postconviction relief are supported by substantial evidence and are justified as a matter of law. Stanford v. Iowa State Reformatory, 279 N.W.2d 28, 31 (Iowa 1979). Where petitioner alleges a violation of a constitutional safeguard, however, we will make our own evaluation of the totality of the circumstances under which the ruling was made. Sims v. State, No. 63982, slip op. at 3 (Iowa Aug. 27, 1980); Hinkle, 290 N.W.2d at 30; Kellogg v. State, 288 N.W.2d 561, 563 (Iowa 1980); Stanford, 279 N.W.2d at 31. This is the equivalent of a de novo review. Sims, No. 63982, slip op. at 3; Hinkle, 290 N.W.2d at 30. Petitioner must establish the factual assertions entitling him to relief by a preponderance of the evidence. Hinkle, 290 N.W.2d at 30; Stanford, 279 N.W.2d at 31; Waits v. State, 257 N.W.2d 70, 71 (Iowa 1977).

II. Ineffective Assistance of Counsel. Petitioner contends the lower court erred in failing to find he was denied effective assistance of counsel both at trial and during the probation revocation hearing.

A postconviction proceeding is the proper method of raising this claim. State v. Stelzer, 288 N.W.2d 557, 560 (Iowa 1980); State v. Smith, 282 N.W.2d 138, 143-44 (Iowa 1979); see State v. Kellogg, 263 N.W.2d 539, 543-44 (Iowa 1978). See also Redding v. State, 274 N.W.2d 315, 316 (Iowa 1979). While the right to counsel means effective assistance of counsel, the standard is "'whether in all the circumstances counsel's performance was within the range of normal competency.'" Stelzer, 288 N.W.2d at 560; State v. Hicks, 277 N.W.2d 889, 896 (Iowa 1979); Cloesen v. State, 258 N.W.2d 330, 332 (Iowa 1977). To prevail, petitioner must show "an affirmative factual basis demonstrating counsel's inadequacy of representation." Cloesen, 258 N.W.2d at 332; see State v. Massey, 207 N.W.2d 777, 780 (Iowa 1973). Every mistake in judgment or error in trial strategy does not serve to deprive an accused of his or her constitutional rights. State v. Veverka, 271 N.W.2d 744, 750 (Iowa 1978).

> Effective [assistance of counsel] does not mean successful. It means conscientious, meaningful representation wherein the accused is advised of his rights and honest, learned and able counsel is given a reasonable opportunity to perform the tasks assigned to him. [citations omitted].

Wycoff v. State, 226 N.W.2d 29, 32 (Iowa 1975).

Using these standards, we consider separately petitioner's claims of ineffective assistance of counsel at trial and during probation revocation proceedings.

A. At Trial. Petitioner claims his trial counsel provided ineffective assistance because counsel failed to prosecute a direct appeal following petitioner's conviction. We disagree. Petitioner testified his attorney discussed his appeal rights and advised him not to appeal because he received probation. He stated that the decision not to appeal was mutual. He does not allege that his decision was not voluntary. Therefore, the voluntariness of petitioner's decision not to appeal establishes that he effectively waived his right to claim his counsel was ineffective by not bringing a direct appeal following his conviction. Even addressing the merits, however, we find from our review of the record that the lower court correctly concluded petitioner's claim of inadequate assistance by trial counsel was neither substantiated by facts on the record nor established at the postconviction hearing. Petitioner testified that he thought trial counsel did a "good job," and was "at least average, if not above average." The record shows no evidence of any effort by petitioner to seek a direct appeal or to secure other counsel. Petitioner's proof plainly fails to show "the affirmative factual basis" required to substantiate a claim of ineffective assistance of counsel at trial. See Cleesen, 258 N.W.2d at 332. We therefore affirm the lower court's ruling on this issue.

B. During Probation Revocation Proceedings. Petitioner also alleges ineffective assistance of counsel during the probation revocation proceedings. We already have noted petitioner's favorable testimony of trial counsel's work. Although it is not dispositive, petitioner, in his assessment of counsel's assistance during probation revocation proceedings, indicated he thought counsel did a good job and was effective. Post Conv. Tr. p. 11.

In his testimony regarding the pursuit of postconviction relief, petitioner stated counsel would not represent him in the proceeding because counsel thought "it was a losing battle—a losing cause. So he wasn't going to do it, so there was no good to it." Post Conv. Tr. p. 5. Petitioner stated that he made efforts to contact trial counsel regarding postconviction remedies within a month or two after entering the reformatory, but that any letters he received from counsel had been thrown away. Trial counsel was not present at the postconviction hearing, nor did petitioner produce copies of counsel's letters allegedly sent to petitioner. Further, while the record shows numerous documented efforts by petitioner to later secure other appointed counsel or to relieve other counsel of responsibilities to petitioner, no evidence appears relevant to substantiate petitioner's claim.

Further, petitioner failed to make an adequate record showing alleged errors in the probation revocation proceedings that resulted from ineffective assistance of counsel. Nothing in the record indicates counsel knew or could have known on January 7, 1977, that petitioner would be returned to prison without further appearance before the court, or that the court in its decision might have considered a report from the Department of Court Services or communications with Dr. Spencer without making these available to petitioner or his counsel. We conclude petitioner has failed to show the "affirmative factual basis" required to support his claim and therefore affirm lower court's ruling on this issue. See Cleesen, 258 N.W.2d at 332.

III. Due Process Violations During Revocation Proceedings. Petitioner further appeals lower court's denial of postconviction relief asserting due process violations during the revocation process. Specifically, he alleges the violations included: a) no neutral factfinder; b) no access to counsel before being removed from jail to prison; c) no written findings of fact and reasons for revocation; d) no opportunity to confront and cross-examine adverse witnesses and evidence; and, e) no opportunity to be heard in person.

We begin our analysis by noting that the United States Supreme Court has provided guidance in determining the quality of process due in various proceedings involving criminal offenders. Four types of proceedings can be identified, each in declining order of the quantity of process due:

> 1) criminal prosecutions, e.g., Boykin v. Alabama, [395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)];
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> 2) probation revocation hearings with imposition of a sentence theretofor suspended [deferred sentence], e.g. Mempa v. Rhay, 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967);
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> 3) probation revocation hearings with the sentence already established and parole revocation hearings, e.g., Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) and Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973); and
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> 4) prison disciplinary proceedings, e.g., Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974) and Baxter v. Palmigiano, 425 U.S. 308, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976).

United States v. Segal, 549 F.2d 1293, 1296 (9th Cir. 1977).

We are here guided by Morrissey and Gagnon in determining whether petitioner's due process rights were infringed. We consider each alleged violation separately.

A. Neutral and Detached Hearing Body. Petitioner contends trial court functioned as less than the "neutral and detached hearing body" contemplated in

Morrissey by receiving an ex parte communication. Morrissey, 408 U.S. at 489, 92 S. Ct. at 2064, 33 L. Ed. 2d at 499. The intent of the Morrissey requirement for a neutral hearing body is to prevent revocation "by one who is directly involved in bringing the charges against the defendant, such as a probation officer, or one who has personal knowledge of an event upon which the charge is based, such as a judge who orders revocation because of a failure to appear before him." People v. Nesbitt, 86 Mich. App. 128, 139, 272 N.W.2d 210, 215 (1978).

The intent of Morrissey appears to be satisfied here as petitioner presented no evidence that the court was directly involved in initiating revocation charges against him or that the court had personal knowledge of the events leading to the probation violation report. The issue then is whether the court's conduct in receiving ex parte communications from Dr. Spencer denied petitioner an impartial tribunal at revocation and, therefore, whether petitioner's probation was revoked improperly.

From the record, we are unable to say, in contrast to Rinehart v. Brewer, 561 F.2d 126, 132-33 (8th Cir. 1977), that the court's actions constituted improper conduct denying petitioner his due process right to a disinterested, impartial tribunal. In Rinehart, before defendant's arraignment, the judge went to Iowa City on his own initiative to consult with a physician who had examined defendant at the court's request. Rinehart, 561 F.2d at 132. The conversation went beyond the scope of the physician's written report; no disclosure was made of the trip or the information gained until after sentencing. The court found the judge's actions denied defendant his due process right to a disinterested and impartial tribunal. Id. at 132-33. The judge testified to concluding before the arraignment that he must sentence defendant to life imprisonment and, therefore, that he had to find defendant guilty of second-degree murder in order to do so. The court found defendant was "fatally prejudiced by the fact that his defense counsel were not informed of the Judge's ex parte inquiry until after the sentencing." Id. at 133. One of defendant's counsel testified that he would not have advised defendant to plead guilty if he had known about the ex parte communication. Id.

Here, we do not have the benefit of the trial judge's testimony at the postconviction hearing. From the revocation hearing order of November 9, 1976, and the letter from Dr. Spencer of November 8, 1976, we surmise a communication occurred on November 8th which may have affected the court's order of November 9, 1976, requesting the Department of Court Services to make a recommendation regarding use of Dr. Spencer's services for petitioner. The letter from Dr. Spencer was favorable to

petitioner. Petitioner presents no evidence, nor do we glean any from the record, showing that the communications with Dr. Spencer resulted in the court's conclusion that imprisonment was the only possible disposition. Further, petitioner knew from the court's November 9th order that the services of Dr. Spencer were being considered as a possible disposition. We therefore are unable to say that petitioner was denied his right to an impartial court at the revocation hearing due to any ex parte communication between the court and Dr. Spencer. We conclude petitioner's argument that he was denied a neutral and detached hearing body is without merit.

B. Denial of Access to Assistance of Counsel. Petitioner next argues he was denied access to the assistance of counsel when he was removed from jail to the men's reformatory at Anamosa by court order without a further court appearance and without an opportunity to confer with counsel. We find this contention also to be without merit.

There is no constitutional duty to provide counsel for indigents in all probation or parole revocation cases. Gagnon, 411 U.S. at 787, 93 S. Ct. at 1762, 36 L. Ed. 2d at 664. But, once counsel is either appointed or privately retained, the question is the extent to which access to counsel is protected.

Initially, we turn for guidance to Gagnon where the role of counsel in revocation proceedings was discussed at length. Therein, the United States Supreme Court emphasized the importance of assistance of counsel during the factfinding process as follows:

> . . . the effectiveness of the rights guaranteed by Morrissey may in some circumstances depend on the use of skills which the probationer or parolee is unlikely to possess . . . .

411 U.S. at 786, 93 S. Ct. at 1762, 36 L. Ed. 2d at 664.

> . . . the unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex documentary evidence.

411 U.S. at 787, 93 S. Ct. at 1762, 36 L. Ed. 2d at 664.

> In some cases, . . . the probationer's or parolee's version of a disputed issue can fairly be represented only by a trained advocate.

411 U.S. at 788, 93 S. Ct. at 1763, 36 L. Ed. 2d at 665.

> The need for counsel at revocation hearings derives not from the invariable attributes of these hearings, but rather from the peculiarities of particular cases.

411 U.S. at 789, 93 S. Ct. at 1763, 36 L. Ed. 2d at 666.

Finally, the court's concern with the fact-finding part of revocation and the role of counsel there is noted in its holding that counsel should be provided when a probationer makes a colorable claim that he has not committed the alleged violation or "... 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." 411 U.S. at 790, 93 S. Ct. at 1764, 36 L. Ed. 2d at 666.

Petitioner relies on Gagnon as authority for his contention that denial of access to counsel following the factfinding portion of his final revocation hearing was a due process violation. Yet, petitioner neither alleges, nor does the record reveal, any of Gagnon's bases for establishing the right to counsel and thereby the right of access to counsel. Petitioner was represented by counsel throughout the factfinding hearing. His complaint is that he had no opportunity to directly confer with counsel at the time he was removed from jail to the reformatory.

We note petitioner was denied only direct access by his removal to the prison; he makes no complaint that he was denied access by other methods. Petitioner testified that he wrote counsel within a month or two after returning to the men's reformatory. Had petitioner needed or wanted to contact counsel earlier, we find nothing in the record that would have prevented him from doing so.

While Gagnon is helpful in understanding the Supreme Court's view of the role of counsel during the two-step revocation process, it did not involve access to counsel following a revocation order. Likewise, the concerns of the Gagnon court for the factfinding part of the revocation proceeding are not raised here. Thus, we conclude that petitioner's reliance on Gagnon adds nothing to support his argument and that he failed to carry his burden of proof on this issue.

C. Lack of Written Findings of Fact and Reasons for Revocation. Petitioner next alleges that the trial court denied his due process right to a written statement of facts as to the evidence relied on and reasons for revocation of his probation. Petitioner correctly relies on Morrissey as requiring a written statement by the factfinder in these regards. Morrissey, 408 U.S. at 489, 92 S. Ct. at 2604, 33 L. Ed. 2d at 499. The Iowa Supreme Court has held "... this means a court which revokes probation must make findings which show the factual basis for the revocation." Rheuport v. State, 238 N.W.2d 770, 775 (Iowa 1976). This not only facilitates appellate review, but also provides a record of the proceedings for the probationer so that a second revocation proceeding cannot be based on the same conduct. See Nesbitt, 86 Mich. App. at 137, 272 N.W.2d at 214 (citing to Kartman v. Parratt, 535 F.2d 450, 456-57 (8th Cir. 1976)).

Trial court, in its January 7, 1977, order, stated: ". . . and from all of the evidence the Court finds the claimed violations were proved beyond a reasonable doubt." We therefore must determine whether this is a sufficient statement of facts or, if not, whether the record reflects any other evidence equivalent to the Morrissey written statement requirement.

First we examine Iowa's decisions since Morrissey. In State v. Hughes, 200 N.W.2d 559 (Iowa 1972), "[a]t the conclusion of the revocation hearing, the trial court stated of record that its position was a preponderance of the evidence showed defendant was involved in an armed robbery." Id. at 561. On appeal, this was found to be a sufficient factual basis. Id. at 562. Yet, as indicated in the dissent, the actual order of trial court gave no indication of the specific evidence relied on as it stated: "the court having reviewed evidence and information offered on such issue, finds as a fact that defendant has violated the terms of his probation and that revocation is recommended." Id. at 564. We note, however, that the defendant in Hughes produced no evidence on his behalf at the revocation hearing and also, through counsel, conceded that the evidence was sufficient to show his participation in the robbery by a preponderance of the evidence standard. Id. at 561.

In Rheuport, in 1976, the court found an oral statement of findings of fact made by the trial court when petitioner's probation was revoked, "made in open court in the presence of the defendant and recorded by a court reporter, is substantially equivalent to the written statement required by Morrissey." 238 N.W.2d at 775. There, trial court referred to the alleged offense and the witnesses to the offense, stating: "[a]nd in this case the other offense * * * which you've committed and have not in any way denied here, and these witnesses came in and told the Court about, certainly seems to me to be a situation that warrants revocation of your probation." Id. at 773-74. The supreme court stated it was not required to decide ". . . whether the written statement supplied a year later at the direction of the postconviction court would have met the requirements of due process." Id. at 775.

The Iowa Supreme Court in Patterson v. State, 294 N.W.2d 683, 685 (Iowa 1980), reiterated its position in Rheuport, wherein trial court was not faulted for failure to find facts which were not in dispute. See Rheuport, 238 N.W.2d at 777. In Patterson, the only evidence before the court was the uncontested violation report. The defendant was present and assisted by counsel. All of the evidence considered was introduced while defendant was before the court. The court found that "[u]nder the circumstances,

the trial court's statement that probation was being revoked based on 'evidence and information' before it was sufficient." 294 N.W.2d at 685. The court went on to say "[w]e do not say it would be enough if there were conflicting evidence to be evaluated." Id. at 683.

In this case, the revocation proceedings were transcribed, except for the ruling and orders which were issued without petitioner's further appearance before the court. No findings of fact are found in the transcribed record of the hearing before the trial court. The court's record contains only the hearing officer's preliminary factfindings and the court's ruling and order with its reference to "all the evidence" in its conclusion that the alleged violations were proven. The alleged violations were described only as "the claimed violations."[1] Based on this record, we conclude neither the court's written statement nor the transcribed record is sufficient to meet due process requirements.

D. Lack of Opportunity to Confront and Cross-Examine Adverse Witnesses.

We next consider whether, as alleged by petitioner, error occurred when the court considered or relied on a report from the Department of Court Services in its decision to revoke petitioner's probation, without making the report available to petitioner or petitioner's counsel. Initially, we note that the following events occurred in the revocation process:

> 11/5/76 - revocation hearing
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> 11/8/76 - telephone call and letter from Dr. Spencer
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> 11/9/76 - trial court's ruling and order for Department of Court Services' recommendation on treatment possibilities with Dr. Spencer
>
> 11/15/76 - report from Department of Court Services recommending petitioner's probation be revoked
>
> 1/7/77 - trial court's ruling and order revoking petitioner's probation

We find the lower court erred in determining that no report from Court Services existed. We then must address whether the trial court used the report in deciding a probation violation occurred or in determining no other dispositional alternative, except incarceration, existed.

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[1] In Kartman, the trial court's factfindings referred to one of the conditions of probation as being to refrain from unlawful conduct and then cited one instance of unlawful conduct. 535 F.2d at 457. The Eighth Circuit found the final report adequate, "although the question was close." Id. The court further found that the trial court's findings served the purposes of the written statement, and, "while meager, were sufficient for appellate review." Id. at 457-58.

If trial court used the report in deciding the factual issues of the violation, Gagnon provides that the evidence against probationer must be disclosed and that probationer must have the right to confront and cross-examine adverse witnesses, unless a good cause finding for not allowing confrontation is made. 411 U.S. at 786, 93 S. Ct. at 1762, 36 L. Ed. 2d at 664. If, however, the court used the report in the dispositional process, the report functions in a manner similar to a presentence report in the sentencing process, or as a supplemental presentence report.

A sentencing judge has broad discretion to decide ". . . not only the relevance but also the reliability of the sentencing information." United States v. Morgan, 595 F.2d 1134, 1138 (9th Cir. 1979). Where a trial court is accorded discretion, we review only for abuse. State v. Gartin, 271 N.W.2d 902, 910 (Iowa 1978). No abuse occurs from receipt of information if it is not used. See State v. Spence, 282 N.W.2d 131, 133 (Iowa 1979). Further, where a presentence investigation report is used, the court has discretion in making the report or a portion thereof available to petitioner, as well as any psychiatric evaluation. Section 789A.5, The Code 1975. See State v. Randall, 258 N.W.2d 359, 363 (Iowa 1977).[2] Unfavorable information, however, should be disclosed. See Rhinehart, 561 F.2d at 133; United States v. McDuffie, 542 F.2d 236, 242 (5th Cir. 1976). Therefore, we conclude that to obtain fundamental fairness in the revocation process, unfavorable information that is explicitly relied on by the court in its disposition should be disclosed in order to resolve inaccuracies and to allow petitioner some opportunity for rebuttal. We cannot determine from the record here the manner in which trial court used the Department of Court Services' report, if it was used at all. The only record we have before us is the court's order of January 7, 1977, sentencing petitioner to the reformatory. The revocation record therefore is inadequate, as is the postconviction record, to assess whether the trial court abused its discretion or whether a due process violation occurred. We conclude the error is based on the lower court's erroneous finding that no report from the Department of Court Services was received and that, therefore, no due process deficiency occurred.

E. Opportunity to be Heard in Person. Petitioner contends error occurred when the court revoked his probation after receipt of the Court Services' report where no further hearings or proceedings were held. We agree. The most serious deficiency in

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[2] A similar provision is now found at section 901.4, The Code 1979. See Spence, 282 N.W.2d at 133.

the revocation proceedings involved the disposition decision and occurred when the petitioner was denied an opportunity to be heard in person and to present witnesses and documentary evidence as required by Morrissey through Gagnon, 411 U.S. at 786, 93 S. Ct. at 1762, 36 L. Ed. 2d at 664. We note that these requirements apply to the entire probation revocation procedure. See also Patterson, 294 N.W.2d at 684. Petitioner was present in court for the hearing on November 5, 1976; he was not present before the court at any time thereafter, including January 7, 1977, when trial court ordered his removal from jail to the Men's Reformatory. During this period, the court may have considered additional information relative to petitioner's case, particularly a telephone communication with Dr. Spencer, a letter from Dr. Spencer, and a report from Court Services. We conclude the probation revocation proceedings ended with the court's order of January 7, 1977, and until then, petitioner had the right to be present with counsel for the proceedings. This right was denied by the trial court's actions.

IV. Directions on Remand. In summary, we conclude the lower court erred in its judgment denying petitioner's postconviction relief because that court incorrectly found no report from the Department of Court Services was received and, as a result, no due process deficiency occurred. We also have found that trial court's findings of fact in the revocation proceeding were inadequate. We therefore remand this case for a limited hearing wherein the trial court is: 1) to make findings in accordance with Morrissey, Gagnon, Rheuport, and Kartman, whereby a) if the information received pursuant to the court's order of November 9, 1976, was relied on in factfinding, it is to be made available to petitioner, or b) if the information received was used or relied on in the dispositional process, the court is to exercise its discretion on the record in allowing or denying petitioner access to the information; and 2) to conduct a limited dispositional hearing with petitioner and the counsel present before the court.

REVERSED AND REMANDED WITH DIRECTIONS.

All judges concur except Carter, J., and Donielson, J., who dissent.

CARTER, J. (concurring in part and dissenting in part)

I agree with the decision of the majority that the trial court's findings are inadequate to permit any meaningful determination as to the basis upon which defendant's probation was in fact revoked. This is very significant in the present case for two reasons: (1) the report of a violation is couched in vague and conclusory terms, and (2) the potential violations which are identified by this report differ greatly in both degree and the extent to which they are supported by the evidence presented at the revocation hearing.

In the absence of knowing which of the several grounds serve as the basis for the revocation of his probation, defendant is severely handicapped in challenging the findings as being against the weight of the evidence or in urging that the violation, if any, does not justify revocation. More detailed findings should be required.

I do not agree, however, that the record supports the conclusion that defendant's rights were in any way violated by the written materials submitted to the trial court for consideration after the November 5, 1976 hearing. The November 5 hearing was the final revocation hearing involving the issues of both (a) violation, and (b) disposition. Defendant was afforded a full opportunity at this hearing to make such showing as he desired. The order of submission entered November 9, 1976 clearly advised all parties that additional materials would be submitted to the court bearing on the issue of disposition and the subject matter which would be involved. If defendant wished an opportunity to respond to these materials, he should have promptly requested that he be permitted to do so upon receipt of the November 9, 1976 order. Having failed to do so, I can only conclude that defendant, through counsel, acquiesced in the procedure employed. If not, the matter should have been challenged in the probation revocation proceedings rather than being raised for the first time in a postconviction application.

Donielson, J., joins in this dissent.