

IN THE COURT OF APPEALS OF IOWA

DOC ALLEN CALLAWAY,	)	
Appellant,	)	Filed January 28, 1977
v.	)	
STATE OF IOWA,	)	<u>17</u>
Appellee.	)	2-58580
	)	

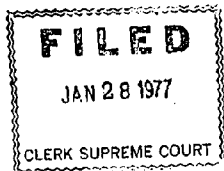
Appeal from Black Hawk District Court - Blair C. Wood, Judge

Appeal from post conviction relief proceeding upholding
the revocation of defendant's probation. Affirmed.

Robert Sosalla, of Cedar Rapids, for appellant.

Richard C. Turner, Attorney General, and David Correll,
Black Hawk County Attorney, for appellee.

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



CARTER, J.

This is an appeal from an order and judgment in a proceeding for postconviction relief pursuant to chapter 663A, The Code. The trial court entered judgment denying the claim of the petitioner (defendant) that his probation had been unlawfully revoked. Upon review of the record of both the probation revocation proceeding and the postconviction proceeding, we affirm the trial court.

The probationary status in question resulted from a suspended sentence imposed on July 11, 1974, by the Black Hawk District Court following defendant's conviction of the offense of forgery. The order granting probation placed defendant under supervision of the Department of Court Services.

On August 19, 1974, the officer supervising defendant's probation recommended in writing to a judge of the district court that the probation be revoked as a result of an incident involving the alleged discharge of a firearm by defendant on August 17, 1974, causing injury to another person. Hearing on this request was set for August 29, 1974, and subsequently continued until September 19, 1974. On the date last referred to, defendant appeared before Judge C. E. Engelkes. The State and defendant each presented evidence concerning the alleged violation and the circumstances surrounding same. Defendant was represented by counsel throughout the hearing. On September 20, 1974, Judge Engelkes entered a written order directing that defendant's probation be revoked and that defendant serve the indeterminate ten year sentence which had been imposed on the forgery conviction.

On February 14, 1975, defendant filed an application for postconviction relief. Hearing on the application was held on June 13, 1975, before Judge Blair C. Wood, who entered judgment dismissing the application.

Defendant on this appeal contends that the postconviction court should have set aside the order revoking his probation on one or more of the following grounds:

- (1) failure to accord defendant a bifurcated hearing in accordance with the due process directives of Gagnon v. Scarpelli, 411 U.S. 778 (1973);
- (2) basing the decision to revoke defendant's probation in whole or in part upon conduct which was not in fact a violation of any condition imposed for the granting of probation; and
- (3) failure to accord defendant notice in writing of the precise conduct relied upon by the State in advocating revocation of probation.

We separately consider each of these contentions.

I. Failure to hold a bifurcated hearing. Defendant asserts it was constitutional error to fail to hold two hearings as suggested in Gagnon v. Scarpelli, 411 U.S. 778 (1973). In Gagnon the Supreme Court held that due process requires a probation revocation proceeding to encompass two analytically distinct components: (a) whether the probationer has in fact acted in violation of one or more conditions of probation and (b) whether he should be committed to prison or some other rehabilitative disposition made. This does not require that two separate hearings be held. Rheuport v. State, 238 N.W.2d 770 (Iowa 1976).

We agree with the postconviction court's conclusion that the probation revocation proceedings in the present case contained both of these required components in accordance with the dictates of Gagnon. The revocation hearing before Judge Engelkes pursued not only the issue of whether there had been a violation of probation, but also matters bearing on the dispositional aspects of the case.

In the trial court defendant asserted that he was denied a

final hearing upon which he could present evidence of disposition. There is no support for this claim in the record. On appeal defendant asserts that it was in fact a preliminary hearing on probable cause which was denied him in the revocation proceedings. It is obvious that whenever the two hearing stages of Gagnon are combined in a single hearing, a probationer is in fact denied a preliminary hearing on whether there is probable cause to detain him. Whether or not he is prejudiced thereby depends upon (a) the time within which the final and only hearing is held, and (b) the result of the final hearing. We agree that defendant was held in custody in the present case prior to any hearing for a period of time which if not explained or justified would be excessive. But we need not concern ourselves with this matter because at this stage of the proceeding there is no relief which we can afford defendant with respect to this circumstance. Even assuming that the initial detention was unlawful for lack of a probable cause determination this does not affect the validity of either the original sentence on the forgery charge or the final revocation order entered following a hearing which fully accorded due process. Compare *State v. Lass*, 228 N.W.2d 758 (Iowa 1975).

II. The basis for the revocation order. Defendant asserts that Judge Engelkes' decision to revoke probation was based at least in part upon conduct not relating to any condition of probation. This contention is more narrowly presented in this court than it was in the trial court. In the trial court postconviction proceedings the defendant urged that there had been no written conditions of probation other than those few conditions, not here material, which were contained in the court's judgment entry. The evidence below was in conflict as to whether any further conditions of probation were reduced to writing.

Without specific findings as to whether any other terms of probation were reduced to writing both the judge who held the revocation hearing and the postconviction trial judge found that the defendant was affirmatively instructed by his probation officer that it was a condition of his probation that he not handle or use firearms.

In his brief in this court defendant concedes that "the indication is that a written probation agreement was, in fact, entered into between the petitioner and his probation officer." Defendant urges, however, that the only condition in said written agreement relevant to the revocation proceeding was that defendant not carry or use any firearms of any kind. Defendant contends that the decision to revoke his probation was based upon his admitted lack of candor with his probation officer in describing his role in the firearm incident.

Defendant is correct in asserting that Judge Engelkes, in his revocation order, placed much emphasis upon defendant's lack of candor and honesty with his probation officer. The revocation order provided, in part:

"[T]he conversation and representations to authorities that followed [the shooting incident] clearly indicate an attempt to manipulate the facts to their advantage without regard for the actual truth."

****this lack of candor and honesty in relating defendant's probation officer evidences a lack of those necessary qualities that must exist between a defendant and his probation supervisor in order to afford probation any reasonable opportunity for success."

We reject defendant's contention that in determining whether to revoke a probation, as distinguished from whether there has been a violation of probation, the court cannot consider and be influenced by evidence of defendant's relationship with his probation officer. We construe Judge Engelkes' order as finding

a violation of probation based upon defendant's careless handling of a firearm causing it to discharge and cause injury to another person. As we have previously stated there was sufficient evidence that this was a direct violation of a condition of probation. After so finding, Judge Engelkes, with respect to the dispositional aspect of the proceeding, gave weight to defendant's admitted falsification in reporting the incident to his probation officer. We believe this was proper and that the decision to revoke was fully justified even though candor and honesty were not specific terms or conditions of probation.

III. Notice of claimed violation. Much of what we have said in the previous division applies to defendant's contention that he was entitled to written notice that his lack of candor and honesty would be made a subject of the probation revocation hearing. The record clearly established that defendant and his attorney were given written notice of the alleged firearm violation and the request of the probation officer that probation be revoked because of that incident. The record further reflects that at the time this written report of violation was prepared defendant admitted involvement in the shooting. After the report was prepared but before it was submitted to the court, defendant altered his story claiming no involvement with the gun and further claiming that he had lied initially to protect his girlfriend.

This change in defendant's story was added as a postscript to the written report of the violation. The defendant signed his name immediately below this postscript prior to submission of the report to the court. In the posture in which the violation report was submitted to the court, defendant must have been aware that his truth and veracity would be an issue. We find no

error in failing to specifically so advise him.

IV. Lastly, the defendant on this appeal seeks to complain of a provision in his original sentence providing that as a "condition of parole" he could be held in jail at the discretion of his probation officer for up to 90 days. The record reflects that defendant was held in jail for 35 days pursuant to this provision between the time of sentencing on July 11, 1974, and August 15, 1974. This was prior to the incident which was the basis for his probation revocation. The trial court characterized this provision of the sentence as "extralegal" but determined that it could not be made the subject of relief in these postconviction proceedings. We do not approve of this portion of the defendant's sentence but we agree with the trial court that it does not affect the validity of the ten year prison sentence imposed in accordance with law or afford any basis for relief from the revocation of defendant's probation.

We have considered all issues presented and find no basis for reversal.

AFFIRMED.