

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 31, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 00-1094-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALLAN R. WASHACHEK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.¹ Allan R. Washachek appeals from a judgment and an order of the circuit court requiring him to spend sixty days in the House of Correction for violating the terms of his probation order. Washachek

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

claims the trial court violated his Fifth Amendment right against self-incrimination when, during a probation review hearing, it asked Washachek whether he had violated the terms of his probation. Because the Fifth Amendment does not prohibit a circuit court from inquiring as to whether a probationer has complied with the terms of his or her probation, this court affirms.

I. BACKGROUND

¶2 On December 3, 1999, Washachek pled no contest to one count of battery arising out of a domestic violence incident. The victim, Washachek's wife, Geraldine, advised the circuit court of her concern that Washachek's violent behavior was related to his excessive drinking. The circuit court then ordered Washachek to maintain absolute sobriety during the period before the sentencing hearing.

¶3 Sentencing occurred on February 11, 2000. During that hearing, Washachek admitted he had not maintained absolute sobriety. The circuit court admonished Washachek and proceeded to sentence him to nine months in the House of Correction, imposed and stayed, with a two-year period of probation. The court established specific conditions for probation, including treatment for domestic violence and treatment for alcohol abuse. The circuit court also ordered Washachek to maintain absolute sobriety and have no contact with the victim. The circuit court advised that any violation of the terms of probation would result in an immediate incarceration.

¶4 Washachek's first review hearing occurred one month later. During the hearing, the circuit court asked Washachek about an anonymous letter the court received, which indicated Washachek had had contact with the victim. Washachek admitted that he had gone to the victim's home to pick up his mail.

Washachek also admitted that he “had a couple drinks” prior to going to the victim’s home. As a result of the admissions, the trial court ordered Washachek to serve sixty days in the House of Correction for violating the conditions of his probation. Washachek appeals from that decision.

II. DISCUSSION

¶5 Washachek claims that the circuit court’s inquiry as to whether he complied with the terms of his probation violated his Fifth Amendment right against self-incrimination. This court disagrees.

¶6 The Fifth Amendment guarantees that a defendant may refuse to answer questions “where the answers might incriminate him in future criminal proceedings.” *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984). Although this right continues during a probationary period after conviction, the right does not apply to a probationer who is being questioned about his or her probationary status where the questioning does not pose a realistic threat of incrimination in a separate criminal proceeding. *See id.* at 435. This court recently adopted the reasoning in *Murphy*. In *State v. Carrizales*, 191 Wis. 2d 85, 528 N.W.2d 29 (Ct. App. 1995), this court held that the Fifth Amendment does not give a probationer the right to refuse to admit guilt for the crime he or she was convicted of during a treatment program that was a condition of the probation. *See id.* at 94. This court reasoned that admitting guilt during the course of a treatment program, following a conviction for sexual assault, did not create a risk that the probationer’s admission would result in incrimination in a separate criminal proceeding. *See id.* at 95.

¶7 As a probationer, Washachek is not entitled to the same degree of constitutional protection as individuals with no criminal convictions. *See State v. Miller*, 175 Wis. 2d 204, 208, 499 N.W.2d 215 (Ct. App. 1993). Here, the circuit

court was not asking Washachek questions, which would result in incrimination in a future criminal proceeding. Rather, the circuit court was simply asking a probationer whether he was complying with the terms of his probation. The Fifth Amendment does not apply to that situation. Washachek's admission that he failed to adhere to the conditions of probation did not result in his prosecution in a separate criminal proceeding, or even future criminal liability in this case. Rather, the procedure was used to enforce compliance with the terms of probation already imposed.²

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

² Washachek argues in reply that *Scales v. State*, 64 Wis. 2d 485, 219 N.W.2d 286 (1974) clearly stands for the proposition that the Fifth Amendment extends beyond the conviction to the sentencing. In *Scales*, our supreme court held that the sentencing court could not use a defendant's refusal to admit guilt as a factor to impose a harsher sentence. See *id.* at 496. The case does not apply here.

