COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

Nos. 98-0756-CR
98-0758-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

STEVEN D. CATHEY,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Reversed and cause remanded with directions.*

Before Vergeront, Roggensack and Deininger, JJ.

VERGERONT, J. Steven Cathey appeals the concurrent jail sentences imposed on him for obstructing an officer contrary to § 946.41(1), STATS., and bail jumping in violation of § 946.49(1)(b), STATS., and the denial of

his postconviction motion requesting that those sentences be vacated. At the time the trial court imposed those sentences, Cathey had been serving the terms of probation the court initially imposed for the two offenses. Cathey contends that the trial court erred in imposing the jail sentences because he did not refuse probation, and no probation revocation proceedings took place. We conclude that the record does not show that Cathey rejected probation, and we also conclude that the proceedings that took place before the trial court were neither probation revocation proceedings nor proceedings to modify conditions of probation. We therefore reverse and remand to the trial court.[1]

BACKGROUND

Pursuant to a plea agreement, Cathey entered a plea of guilty to the charges of obstructing an officer and bail jumping on January 22, 1997. The court accepted the plea, withheld sentence on each offense, and imposed a three-year term of probation on the bail jumping offense and a concurrent two-year term of probation on the obstructing offense. As a condition of probation for the bail jumping offense, the court ordered a fifteen-day jail sentence, and as a condition of probation on the obstructing charge, the court ordered alcohol and drug assessment as recommended by the agent. The court also imposed consecutive jail terms of six months and of forty-five days on two other charges to which Cathey entered guilty pleas pursuant to the plea agreement, both consecutive to the fifteen days in jail ordered as a condition of probation. The jail terms were to begin immediately.

[1] It is unnecessary to decide on this appeal whether the court, as opposed to the Department of Corrections, has the exclusive authority to revoke probation, an issue presently before the supreme court in ***State v. Horn***, Case No. 97-2751-CR.

Cathey, his counsel, and an assistant district attorney appeared before the trial court on May 30, 1997. The circuit court record describes the proceeding on this date as "reopen," but there is no motion or notice of motion in the record. The court began by asking counsel what Cathey wished to do, and the following interchange took place.

> MR. MONNIER: Your Honor, this was originally called as a revocation hearing. And we're prepared to proceed with the revocation hearing.
>
> We would also -- The charges stem from two root causes. One being personality conflict with the social work, and the second one being a chemical dependency problem, which my client has admitted to and is seeking help for.
>
> If at all possible, we would like to proceed on the probation with a different social worker. And, if that's not the case --
>
> THE COURT: (Interposing) Okay. Here's your problem. The Department of Corrections is in charge of the probation. The revocation will take place in front of an Administrative Hearing Officer for the Department of Corrections.
>
> The only thing that I have the power to do is accept his rejection of probation and proceed to sentence him. I cannot, at this point, interfere with his probation because, once those sentences have been imposed, he's under the custody of the Department.
>
> And, whether they choose to revoke or not, he can appeal the revocation and do that all throughout the Department. But he can't do it here.
>
> MR. MONNIER: At this point, we would like to proceed with the revocation and proceed with the sentencing.
>
> THE COURT: Okay. You understand that it isn't the revocation. It's, rather, he is rejecting probation at this point and proceeding to sentence on that.
>
> MR. MONNIER: Yes, Your Honor.
>
> THE COURT: Any objection from the State?
>
> MR. BJERKE: No.

> THE COURT: All right. Then we'll proceed to sentencing.

In his sentencing argument, the prosecutor contended that the Violation Investigation Report, apparently prepared by Cathey's probation agent, showed that Cathey continued to ingest controlled substances and "refuses to cooperate with probation." The prosecutor asked the court to sentence Cathey to four years in prison on the bail jumping charge and nine months on the resisting charge. Cathey's probation agent was also present and described his lack of motivation and compliance and, in particular, his refusal to comply with the ADDIC program "until he was threatened with revocation." She stated that she did not disagree with the State's recommendation. However, since she had told Cathey she would recommend jail when he asked "what [her] recommendation would be if he was either revoked or sentenced," she told the court that she would "uphold [her] commitment to him and recommend jail."

In his comments, Cathey's counsel acknowledged that some "charges" had been "brought against" Cathey, and he asserted that they were based on Cathey's personality conflict with his probation agent and "his admitted chemical dependency, which he is seeking help with." Counsel also stated:

> Also, being as how the fact that this revocation hearing was brought by my client, he wasn't forced into this. He's just looking for a way out because it seems like things have snowballed with the parole -- or with the probation period.

Counsel went on to request that Cathey be sentenced to time served, but if jail time were imposed, that Cathey be given Huber privileges.

When the court gave Cathey the opportunity to speak, Cathey began by explaining his disagreement with his probation agent over which AODA program he should attend and added:

> And I have spoken with her about this. And that just wasn't good enough.
>
> I have a hearing on the 3rd with the supervisor and with Madison concerning my conflict with my probation officer. All I asked for was another probation officer, not to revoke my probation. I wasn't rejecting probation, just -- I have a conflict with it. That was the only problem that happened. I haven't committed a crime.

The following interchange then took place:

> THE COURT: Mr. Cathey, you put this on my calendar to reject probation today. And now I'm ready to do your sentencing. And now you're talking about all you want is a different probation officer.
>
> MR. CATHEY: All I wanted at first, ma'am, was a different probation officer.
>
> THE COURT: We're way beyond that now.
>
> MR. CATHEY: Yes. I know this.
>
> THE COURT: The only question is, What am I going to do with you now?
>
> MR. CATHEY: I don't know.

There followed discussion among the attorneys and the court about the credit due Cathey for time served, and after that was resolved, the court again addressed Cathey:

> So the problem I have with you, Mr. Cathey, is that you do have a severe addiction problem. And we put you on probation so you could try to deal with that problem.
>
> I think I told you at sentencing, I don't care about personality conflicts because you are the guy who's on probation. You're the guy who's got to do what Ms. Ellefson tells you to do. So now here we are.

> MR. CATHEY: Can I say something?
>
> THE COURT: Go ahead.
>
> MR. CATHEY: Judge Rice was here.
>
> THE COURT: Judge Rice was here for the sentencing. I talked to Mr. McCoy that way. That's right. So what am I going to do with you now?
>
> MR. CATHEY: I just wanted to finish my probation. That's all I want to do.
>
> THE COURT: We're beyond finishing your probation now.
>
> MR. CATHEY: I know.

The court then asked if Cathey had any violations in jail. The probation agent answered that there were "cigarette violations, battery to inmate," but that she was not aware of any while he was held "on [her] holds." Cathey interrupted to comment on his version of the battery incident, the court officer offered to go check the computer, and Cathey's counsel volunteered that he believed the battery occurred in 1990. These questions were not resolved. The court sentenced Cathey to one year in jail on the bail jumping charge and nine months on the obstructing charge, concurrent, with no Huber privileges until evaluated by the Justice Sanctions Program.[2]

Cathey filed a postconviction motion requesting vacation of the jail sentences and a hearing to determine whether he had violated the requirements of his probation, and, if so, whether probation should remain unchanged, be modified or revoked. The grounds for the motion were that Cathey did not knowingly and voluntarily relinquish probation, he informed the court that he wanted to finish probation, and the court sentenced him without making any finding that he was

[2] The jail terms were apparently stayed pending appeal.

rejecting probation. This motion was deemed denied because not acted on within sixty days. *See* § 809.30(2)(i), STATS.

DISCUSSION

On appeal Cathey repeats his argument that because he never clearly stated that he wanted to reject probation,[3] the court should not have proceeded to sentence him. He requests that we reverse the judgments of conviction and sentence entered on May 30, 1997, acknowledging that, if the Department of Corrections wishes to commence probation revocations proceedings, it may do so. The State responds that the trial court reasonably determined that Cathey no longer wished to remain on probation, but that, if we disagree, we should treat the hearing as one modifying probation and affirm the sentences on that basis. The State does not ask us to construe the proceeding as a probation revocation proceeding, because it acknowledges that the May 30, 1997 proceeding did not afford Cathey the procedural protections guaranteed him under the due process clause before probation is revoked. *See* ***Gagnon v. Scarpelli***, 411 U.S. 778, 782 (1973); ***State v. Gerard***, 57 Wis.2d 611, 617, 205 N.W.2d 374, 377-78 (1973).

We appreciate the State's forthright acknowledgment that the May 30, 1997 hearing did not provide Cathey the constitutional safeguards to which he is entitled before revocation of probation. We agree, and therefore we do not construe that hearing as a proceeding to revoke Cathey's probation.

[3] To avoid confusion, we use "revocation of probation" to mean a proceeding initiated by either the department or the court to terminate a defendant's probation regardless of the wishes of the defendant; we use "rejection of probation" to mean a decision by the defendant not to accept, or not to continue, a term of probation imposed by the court.

However, we do not accept the State's invitation to construe the proceeding as one to modify the terms of Cathey's probation. It is true that a court may modify the terms and conditions of a defendant's probation "for cause." Section 973.09(3)(a), STATS. But this record does not support the conclusion that the court intended to maintain the defendant's three-year and two-year concurrent terms of probation while modifying the length of jail time from fifteen days to one year on the bail jumping charge and from no jail time to nine months' jail time on the other, and neither Cathey nor the prosecutor nor the probation agent asked the court to do that.

The State cites case law that permits a reviewing court to modify a sentence that a trial court could not lawfully enter so as to carry out the trial court's intent while bringing the sentence into compliance with the applicable law. *See* ***State v. Walker***, 117 Wis.2d 579, 584, 345 N.W.2d 413, 415-16 (1984). However, the court in ***Walker*** states that is appropriate "when it is clear what the trial court intended to do," but it is not appropriate when the reviewing court "would have to infer what sentence the trial court would have imposed…." ***Id.*** This record provides no basis for concluding that we would be carrying out the trial court's intent were we to "modify" the jail sentences it imposed by making those jail terms conditions of the probations originally imposed. Moreover, this alternative construction of the proceedings does not address Cathey's argument that he wanted to serve out the probation as originally imposed with a new probation agent. Because treating the proceeding as one to modify the terms and conditions of probation does not comport with the intent of the court or the parties, we decline to construe it as such. We therefore do not address whether the proceeding afforded Cathey the procedural protections to which he was constitutionally entitled before the terms and conditions of his probation could be

modified. *See* ***State v. Hays***, 173 Wis.2d 439, 446-47, 496 N.W.2d 645, 650 (Ct. App. 1992).

We turn now to the question of whether the trial court correctly concluded that Cathey wished to reject the probation the court had previously imposed and be sentenced. As both parties agree, there is little Wisconsin case law on rejection of probation. In ***Garski v. State***, 75 Wis.2d 62, 76-77, 248 N.W.2d 425, 433 (1977), the court rejected the argument that a plea was unknowing and involuntary because the trial court did not inform the defendant of the possible probation conditions it could order, and stated, "If the defendant finds the conditions of probation more onerous than the sentence which would have been imposed he can refuse the probation." In ***State v. Migliorino***, 150 Wis.2d 513, 541-42, 442 N.W.2d 36, 48 (1989), the court relied on ***Garski*** and reversed a trial court's decision refusing to honor a defendant's request for a sentence of incarceration and not probation. The court in ***Migliorino*** acknowledged that there was no specific statutory authority for a defendant to reject a condition of probation, except the specific condition of community service. *See* § 973.09(7m)(a), STATS. However, because the general statute on probation interpreted in ***Garski***, § 973.09, had remained substantially unchanged, the court felt bound to follow ***Garski***, although it did request the legislature to consider an amendment to eliminate the option of rejecting probation by a convicted defendant. ***Migliorino***, 150 Wis.2d at 541-42, 442 N.W.2d at 48. That has not occurred. Therefore, in spite of the misgivings the supreme court expressed in ***Migliorino***, the case law at present establishes that a convicted defendant has the right to reject probation at the time the court orders probation.

Neither ***Garski*** nor ***Migliorino***, nor any other Wisconsin case of which we are aware, addresses whether a convicted defendant has the right to

reject probation after he or she has begun serving probation. Both Cathey and the State assume a defendant does have that right. We will assume without deciding that Cathey did have the right to reject probation several months after it was imposed.

Cathey does not advise us of the appropriate standard for our review of the trial court's decision that Cathey was rejecting probation. The State suggests that we employ the same standard of review as we do when we review a defendant's request to withdraw a plea on the ground that it was not knowingly and voluntarily entered. The State describes that standard of appellate review as "based on the totality of the circumstances." However, "totality of the circumstances" in the plea withdrawal context refers not to the appellate standard of review, but to the second step of the analysis that applies when a defendant moves to withdraw his plea under the standard established in ***State v. Bangert***, 131 Wis.2d 246, 275, 389 N.W.2d 12, 26-27 (1986). The first step is that the defendant must make a prima facie showing that the plea was accepted without the trial court's conformance with § 971.08, STATS., or other mandatory procedures. ***Id.*** If the defendant does that, and alleges that he or she in fact did not know or understand the information that should have been provided at the plea hearing, the burden then shifts to the State to show by clear and convincing evidence that the totality of the circumstances demonstrates that the defendant's plea was knowingly, voluntarily and intelligently entered despite the inadequacy of the record at the time of the plea's acceptance. In meeting its burden under the second step, the State may examine the defendant or defendant's counsel regarding the defendant's understanding and knowledge, and utilize the entire record. ***Id***. In other words, the second step is not limited to what the record of the plea colloquy shows, but includes the "totality of the circumstances."

In this case, we have only the record of the hearing at which the trial court considered that Cathey rejected probation. There are no prior proceedings that shed any light on his relevant understanding and knowledge. And, since Cathey's postconviction motion was deemed denied, there was no evidence presented at a postconviction hearing. Therefore, there is no "totality of the circumstances" to consider, but only the record of the May 30, 1997 proceeding.[4] The State does not request a remand for an evidentiary hearing at which it would have the opportunity to show that Cathey did intend to reject probation.

When we review a trial court's denial of a motion to withdraw a plea as not knowingly, voluntarily and intelligently entered, we first review the record of the plea colloquy to determine whether the defendant has made his or her prima facie case. *See* ***State v. Hansen***, 168 Wis.2d 749, 755, 485 N.W.2d 74 (Ct. App. 1992). That is a question of law which we review de novo. ***Id.*** We do not wish to import the colloquy requirements or the burden shifting analysis of ***Bangert*** into the probation rejection context. However, we do conclude that our review of the record of the May 30, 1997 hearing should be de novo. There are no factual findings by the trial court after a postconviction motion, and the trial court did not,

[4] The State also cites ***State v. Simpson***, 185 Wis.2d 772, 779, 519 N.W.2d 662, 664 (Ct. App. 1994), as another example of the standard of appellate review we should employ, "based on totality of the circumstances." Again, however, "totality of the circumstances," referred to as "totality of the record" in ***Simpson***, describes what the trial court, or the reviewing court, considers in deciding if the waiver was knowing and voluntary. In ***Simpson***, the defendant asserted that he did not knowingly, intelligently and voluntarily waive his right to testify. We stated that, following ***Albright***, we were to consider the "totality of the record," and that included the evidence presented at the postconviction hearing, at which both the defendant and defense counsel testified. ***Id.*** at 779-80, 519 N.W.2d at 664. We accepted the trial court's finding that defense counsel was more credible than the defendant as not clearly erroneous, and, accepting that version of events, we concluded that the evidence showed the defendant knowingly and voluntarily waived his right to testify. ***Id.*** ***Simpson*** does not help to define our standard of review in this case, where there was no postconviction evidentiary hearing at which the trial court made findings of fact concerning the defendant's knowledge and understanding.

at the May 30, 1997 proceeding, discuss or make findings regarding whether Cathey in fact wanted to reject probation and be sentenced. Therefore, we have no trial court findings or exercise of discretion to which to defer.

There remains the question of whether a trial court is obligated to follow any particular procedures in accepting a probationer's rejection of probation. As both parties agree, neither ***Garski*** nor ***Migliorino*** shed any light on the procedure a trial court is to employ. Cathey argues that, whatever the requirements may be for a valid acceptance by the court, they were not met in this case. The State contends that it should be acceptable for counsel to articulate a rejection of probation on behalf of his or her client in the client's presence, noting that a defendant's attorney may waive certain constitutional rights on behalf of his or her client in the client's presence.[5] The State cites as an example ***State v. Albright***, 96 Wis.2d 122, 133, 291 N.W.2d 487, 492 (1980). In ***Albright***, the court held that a defendant's counsel, in the absence of the express disapproval by the defendant on the record, may waive the defendant's constitutional right to testify. ***Id.*** We will assume without deciding that a convicted defendant need not state personally that he is rejecting probation, but that counsel may reject probation on behalf of his or her client in the client's presence, in the absence of an express disapproval by the client.

[5] The State argues that, since the right to reject probation is purely statutory, the procedure for waiving any constitutional right should be adequate. While it is true that there is no constitutional right to reject probation, it does not necessarily follow that no constitutional right is implicated when a probationer rejects probation. The reason procedural protections are required before probation may be revoked is that revocation deprives the probationer of the conditional liberty dependent on observing the conditions of probation, and that liberty, although conditional, is protected by the Fourteenth Amendment. *See* ***Gagnon***, 411 U.S. at 781-82 (citing ***Morrissey v. Brewer***, 408 U.S. 471, 480-81 (1972)). Since it is not necessary on this appeal to define the precise nature of the interests or rights implicated when a probationer rejects probation, we do not discuss this issue further.

We conclude that the record of the May 30 hearing does not show that Cathey rejected probation. It appears from the record that Cathey's counsel requested the hearing before the court, but it is not clear what he expected to happen at the hearing. Counsel appears uncertain as to whether or not a revocation proceeding was going to take place. He initially asks, on Cathey's behalf, for probation with a different social worker. When the court advises him that it could neither revoke probation or "interfere with probation," but only accept a rejection of probation and sentence Cathey, his counsel does say he understands that. Had the discussion of rejecting probation ended there and had the rest of the proceeding been devoted solely to sentencing, we might well agree with the State that, applying the standard of ***Albright***, Cathey's counsel rejected probation on Cathey's behalf.

However, Cathey's counsel's later comments during the sentencing discussion raise questions about his understanding and, indirectly, his client's understanding of the nature of the proceeding: He again refers to Cathey's conflict with his probation agent and emphasizes that "this revocation hearing was brought on by my client, he wasn't forced into this. He's just looking for a way out because it seems like things have snowballed with the parole—or with the probation period." Then when the court invites Cathey to speak, Cathey explains that he is in the process of pursuing an administrative resolution of his conflict with his probation agent, and clearly states that he did not ask "to revoke my probation. I wasn't rejecting probation…." His answer of "Yes. I know this" to the court's statement, "We're way beyond [having a different probation officer] now," does not clear up the uncertainty about what Cathey is asking for: The court's statement to Cathey could reasonably have conveyed to him that it does not matter at this point whether he wants to reject probation or not because, based

on his attorney's representations that he wanted to, the court has moved on to sentencing and will not revisit the question of whether he wishes to reject probation. This uncertainty emerges again, when, after discussion of credit for time served, Cathey states: "I just wanted to finish my probation. That's all I want to do." Again, his answer of "I know" to the trial court's statement that "[w]e're beyond finishing your probation now" does not necessarily indicate he wanted to reject probation and be sentenced: it can just as well mean that he understood he did not at that point have the option of saying he did not want to reject probation.

We recognize that case law has not established procedures for a trial court to follow in accepting a probationer's rejection of probation, and we do not hold that a trial court must follow any particular procedure. However, the trial court must satisfy himself or herself that the probationer wants to reject probation. When the probationer's attorney's statement or the statements of the probationer are confusing or equivocal concerning whether the probationer wants to reject probation, the court should ask the questions necessary to establish that the probationer does in fact want to reject probation. We cannot conclude that it was "too late" at the point in time that Cathey made his statements indicating that he did not want to reject probation. The preliminary discussion on what Cathey's counsel was asking the court to do and what the court believed it could do was brief; there was a one word answer from his counsel; and the court proceeded directly to sentencing. Because Cathey's statements indicate that he did not want to reject probation, and because the court never clarified whether he did or not, we are persuaded that the sentences imposed on May 30, 1997, should be reversed and Cathey should be restored to his probation status.

Accordingly, we reverse the order denying postconviction relief and the two judgments accepting probation rejection and imposing sentences entered on May 30, 1997. On remand, the court shall enter any orders necessary to restore Cathey to probation status. Nothing in this opinion prevents the proper body from initiating probation revocation proceedings, if such proceedings are appropriate.

By the Court.—Judgments and order reversed and cause remanded with directions.

Not recommended for publication in the official reports.