

No. CA-14-006

Pascua Yaqui Court of Appeals

Freddy Jose Salazar, Appellant,

vs.

Pascua Yaqui Tribe, Appellee,

Appeal of a Tribal Court Order in Case No. CR-12-139, the Honorable Cornelia Cruz presiding.

Patricia Leon-Enriquez, Pascua Yaqui Public Defender, 7474 S. Camino de Oeste, Tucson AZ 85757 for the Appellant.

Guadalupe Gutierrez, Office of the Prosecutor of the Pascua Yaqui Tribe, 7777 Camino Huivisim, Tucson, AZ for the Appellee.

Opinion

Summary

There are three main issues before this Court. The first issue is whether the petition to revoke probation should have included efforts made to locate Appellant or Appellant's last known address pursuant 4 PYTC § 4-130(E). This Court holds that the petition to revoke probation filed in this case was in correct form in accordance with 4 PYTC § 4-130 and did not need to be a petition in absentia because Appellant's whereabouts were not unknown throughout the entire course of the proceeding.

The second issue is whether the petition to revoke probation violated Appellant's due process rights by containing conditions unknown to Appellant. Appellant's due process rights were not violated because he was given notice and a copy of the conditions of his probation on September 26, 2012 when he signed written instructions acknowledging the conditions and on July 17, 2013 via court order.

The last issue before this court is whether the Tribal Court should have inquired into the reasons for Appellant's failure to pay probation fees. The Tribal Court did not abuse its discretion by not asking Appellant for reasons regarding his failure to pay the fees because Appellant's probation was revoked for numerous infractions and not solely on his failure to pay fees.

I. Background

Appellant appeals the Tribal Court's decision to revoke his probation on September 10, 2014. Appellant was charged by criminal complaint with Count 1, carrying a concealed or deadly weapon, a violation of 4 PYTC § 1-490; Counts 2 and 3, narcotics and dangerous drugs, violations of 4 PYTC § 1-780(C); Counts 4 and 5, possession, manufacture, delivery and advertisement of drug paraphernalia, violations of 4 PYTC § 1-790(A). Appellant pled guilty to Counts 1 and 3 and counts 2, 4, and 5 were dismissed by the Tribe with prejudice.

Pursuant to the plea agreement, Appellant was sentenced on Count 1 to 180 days detention with 90 days credit for time served and the balance of 90 days suspended for 12 months of supervised probation. Defendant was ordered to obtain counseling for substance abuse or domestic violence treatment with the Centered Spirit Program or with any other counseling program approved by the Probation department and to submit written proof of any counseling. Defendant should not possess any alcoholic beverages or any illegal drugs, was ordered not to possess any weapons and would be subject to random breathalyzer and urinalysis tests and weapons checks. Appellant was ordered to complete 60 hours of community service due in full on or by January 25, 2013, and to submit written proof of all the completed hours to the Probation department.

Appellant was to initiate contact with the Probation Officer on or by September 28, 2012, and thereafter report to the Probation Officer at the Officer's discretion. A \$20.00 probation fee was due the 1st day of each month and Appellant was ordered to abide by the requirement made by the Probation officer. Failure to comply would result in the suspended days being imposed. The identical sentence was imposed for Count 3, except that Appellant was ordered to pay \$20.00 due on the 1st of each month and to pay Court costs of \$50.00 due in full on or by October 26, 2012. All the jail days, probation terms, community service hours, and probation fees were ordered to run concurrent to each other. The judge and Appellant signed a Standard Conditions of Probation form on September 26, 2012.

A Motion for Revocation of Probation and Request for Arrest Warrant was filed against Appellant on April 4, 2013, alleging Appellant violated a condition of his probation by failing to report to the probation officer. Appellant's whereabouts were unknown to the probation officer and Appellant failed to provide a current address. Appellant violated another condition by failing to provide notification

of a true and current change of address to the probation officer within 72 hours. Appellant also failed to pay the \$20.00 probation fee for December 2012, January, February, March, and April 2013, for a total of \$100.00 of unpaid probation fees. Appellant failed to submit written proof of completed community service hours (60 hours) prior to January 25, 2013. Appellant violated another condition by failing to submit proof of attendance to any form of counseling as ordered by the Court.

A detention release hearing was held on July 11, 2013, and the arraignment hearing on the motion to revoke probation was held on July 17, 2013. Appellant was found in violation of his conditions of probation and his probation term was extended to December 26, 2013. He was ordered to comply with all the previously imposed conditions of probation and to continue to report to the Probation Officer as directed by the Probation Officer.

On October 22, 2013, a second motion to revoke Appellant's probation and request for arrest warrant were filed. The motion alleged Appellant violated his probation by failing to report to the probation officer once a week or as directed by the probation officer and that his whereabouts were unknown to the probation officer. Appellant had not been in contact with his probation officer since August 23, 2013. Appellant also failed to provide notification of a true and current change of address to the probation officer. Appellant violated another term by failing to pay probation fees for August, September, and October 2013, for a total of \$60 in unpaid probation fees.

On July 17, 2014, Appellant was arrested and a hearing was held on the Motion to Revoke Probation. According to the Tribal Court's Order, the probation officer felt that Appellant should be given another chance, and the officer expressed a willingness to work with Appellant because he admitted himself into treatment. Appellant was ordered to comply with all the terms and conditions of the treatment facility and failure to remain in the facility would result in the bond being reinstated and a bench warrant being issued. Appellant was ordered to report to the probation officer immediately after the hearing and to comply with all the terms and conditions of probation previously imposed. An arraignment hearing on the motion to revoke probation was scheduled.

On July 22, 2014, Appellant appeared for arraignment on the motion for revocation of probation. He denied all allegations in the motion, and on September 2, 2014, Appellant was scheduled to appear for the motion to revoke probation. Defendant did not appear. On September 3, 2014, Appellant again failed to appear for court because Appellant and treatment staff got the dates confused due to Appellant having several scheduled hearings.

The motion to revoke was scheduled for September 10, 2014. Appellant's probation was revoked on September 10, 2014 after the Court heard testimony from the Tribe and Appellant's witness and after

reviewing the evidence. The Court found Appellant was aware of what the terms and conditions of probation were as the Court's order of July 17, 2013 ordered that he comply with all previously imposed conditions of probation when the Court found he had violated his probation and extended the probation term. The term was revoked, and the suspended 90 days were reinstated with credit for time served of 17 days. The balance of 73 days was to be served immediately. Appellant was ordered released from custody on November 22, 2014. Appellant filed a Notice of Appeal on September 12, 2014.

II. Petition to Revoke Probation

We review a trial court's decision to revoke probation for an abuse of discretion. *Green v. Superior Court*, 132 Ariz. 468, 470-71 (1982). The petition to revoke probation filed in this case was in correct form in accordance with 4 PYTC § 4-130 and did not need to be a petition in absentia because although Appellant's whereabouts were unknown initially, Appellant was present for several of the proceedings including the Court's revocation of probation.

The Pascua Yaqui Code allows probation revocation through two procedural paths. When the whereabouts of probationer are known, the Code provides guidance through 4 PYTC § 4-130. Where the probationer's whereabouts have been unknown for at least 30 days, the Code provides guidance through 4 PYTC § 4-130 (E). Revocation of probation in absentia is a severe remedy and requires strict compliance. See *State v. Alegre*, 120 Ariz. 323, 585 P.2d 1235 (1978). Revocation of probation in absentia is a severe remedy because an "absent defendant loses the opportunity to exercise his right of allocution and the judge is not able to personally question and observe the defendant." *State v. Adler*, 189 Ariz. 280 (1990) (citing *State v. Fettis*, 136 Ariz. 58, 59).

Yet in *State v. Canady*, the court reasoned that defects in a probation revocation proceeding due to the defendant's absence can be cured by the defendant's appearance at subsequent proceedings. 124 Ariz. 599, 602 (1980). *Canady* states that the rules governing probation revocation in absentia provide the vehicle for revoking probation where the probationer's whereabouts are unknown at the outset of the proceedings **and remain so during the entire course thereof**. 124 Ariz. at 601 (citing *State v. Lovell*, 123 Ariz. 467, 600 P.2d 1099 (1979)) (emphasis added).

In *Canady*, the defendant appeared for the initial appearance and the revocation arraignment, but voluntarily did not attend the other proceedings, and the trial court went ahead and revoked his probation. The court found that they were not presented with a revocation in absentia issue because Canady waived

his right to be present by voluntarily not attending the hearings and “absenting himself from the jurisdiction.” *Canady*, 124 Ariz. at 602. Therefore, the court had the power to revoke his probation in light of his voluntary absence from the proceeding. “Any defects in the revocation proceeding caused by appellant’s absence were cured by the disposition hearing held subsequent to appellant’s arrest in March, 1978.” *Id.* During the hearing in March, 1978, Canady was allowed to explain his absence. The court vacated its earlier imposition of sentence and found Canady had violated his probation terms.

In this case, the Tribal Court judge signed an arrest warrant for Appellant on October 22, 2013 but it was not executed until July 17, 2014. It appears that once 30 days passed and Appellant could not be arrested or found, the court could have converted the proceedings and revoked him earlier. However, the Court did not do so. The Court proceeded only after Appellant’s whereabouts were known. Appellant appeared at his revocation proceedings and hearings. In one or two instances, he did not appear for court, but he appeared for revocation and sentencing and several of the proceedings leading to his revocation including; July 17, 2013 for an arraignment on motion to revoke probation, July 17, 2014 for a detention release hearing on motion to revoke probation, July 22, 2014 the arraignment hearing for the motion to revoke, and September 10, 2014 probation revoked. The proceedings were not converted into in absentia proceedings, and Appellant appeared for the subsequent hearings, so there was not an abuse of discretion in revoking his probation.

III. Due Process Rights

Appellant’s due process rights were not violated because he was given notice and a copy of the conditions of his probation on September 26, 2012 when he signed written instructions acknowledging the conditions and on July 17, 2013 via court order.

The Pascua Yaqui Code provides, “Probation shall not be revoked for violation of a condition or regulation of which the probationer has not received a copy.” 4 PYTC § 4-130 (C)(2)(b). Appellant asserts that he was not given proper written notice in violation of his Due Process rights. The Pascua Yaqui Tribal Code provides that probation cannot be revoked for the violation of a term or condition of probation that has not been provided to the probationer in writing, Nonetheless, the purpose for this rule is to reduce evidentiary disputes about the probationer’s knowledge concerning impermissible behavior. Second, it protects probationers against arbitrary action on the part of probation officers. *State v. Heasley*, 23 Ariz. App. 345, 347 (1975).

Appellant cites *U.S. v. Hamilton*, 708 F.2d 1412 (9th Cir. 1983). In *Hamilton*, the defendant was sentenced to five years on October 18, 1976, with the sentence suspended on the condition that he complete five years of probation and spend 120 days in a jail-type setting, which would be served on the

weekends. Hamilton completed 49 of the 60 weekends. There was no evidence that he was admonished for not completing his jail term.

In *Hamilton*, the defendant's first probation officer overlooked his failure to complete 11 weekends of incarceration and condoned the substitution of general oral reports made at irregular intervals for timely written reports, contacted Hamilton infrequently, and allowed him to live temporarily in Newport Beach without specifying an exact address. This indicated the officer was "apparently satisfied with Hamilton's conduct" *Hamilton*, 708 F.2d at 1415. Hamilton was under the probation officer's supervision for more than four years, and three years passed before revocation proceedings were initiated.

The district court revoked Hamilton's probation and reinstated his suspended five year sentence. The case was appealed and the Ninth Circuit vacated the district court's order and noted that "In light of appellant's efforts to bring the matter to the court's attention, the petitioner's default with respect to the jail sentence can no longer be considered a valid basis for revoking his probation. Revocation of probation after unreasonable delay or under circumstances inherently misleading to the probationer is an abuse of discretion." *Hamilton*, 708 F.2d at 1415 (citing *United States v. Tyler*, 605 F.2d 851, 853 (5th Cir. 1979)).

Hamilton is distinguishable from the case at bar. In the instant case, Appellant was initially given the conditions of probation, which were signed by him and the judge on September 26, 2012. He was subsequently advised by the judge that he should continue to comply with the original conditions of probation. When Appellant's probation was modified and extended on July 17, 2013, the court issued an order stating the probation term was modified and extended to December 26, 2013 and that the original conditions would apply.

Appellant knew the conditions of probation. He admitted himself for treatment, which was a requirement of probation. He also informed the officer of his change of address at one point during the probationary period and made payments toward his probation fees, both conditions of his probation. In addition, the probation officer filed the petition to revoke Appellant's probation within a couple of months after a violation had been discovered, which was not unreasonable and should have given no indication that he condoned Appellant's behavior. Appellant received the conditions of his probation in writing when his probation was initiated. In addition, Appellant's initial compliance with the probation conditions shows he knew and understood what they were. Appellant's due process rights were not violated.

IV. Failure to Pay Probation Fees

The last issue before this Court is whether the Tribal Court should have inquired into the reasons for Appellant's failure to pay probation fees.

A court cannot revoke a probationer's probation solely due to his failure to make payments without further inquiry into his ability to pay. The United States Supreme Court has "held that when the sole basis for revoking probation is the failure to pay a fine or restitution, the sentence court may only sentence the probationer to prison in very limited circumstances." *Bearden v. Georgia*, 461 U.S. 660 (1983). The Supreme Court provides that in revocation proceedings for failure to pay a fine or restitution, the sentencing court must inquire into the reasons for the failure to pay. See also *State v. Davis*, 159 Ariz. 562, 563 (1989) (Superior Court may not revoke probation and sentence a defendant to imprisonment solely on grounds of nonpayment without inquiring into the defendant's ability to pay).

In the instant case, Appellant's probation was not revoked solely based on his failure to pay a fine or restitution. Other infractions occurred, which warranted revocation of his probation. Therefore, the judge did not have to inquire into his ability to pay. The Tribal Court judge did not abuse her discretion in revoking Appellant's probation.

V. Conclusion

For the foregoing reasons, the Tribal Court's judgment is affirmed.

So ORDERED on this 17th day of November, 2014.



James C. Hopkins, Chief Judge