Opinion No. 64-106

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BY: OPINION OF EARL E. HARTLEY, Attorney General Joel M. Carson, Assistant Attorney General

TO: Dr. Manuel N. Brown, Director, Probation and Parole Board P. O. Box 2006, Santa Fe, New Mexico

QUESTION

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1. Whether a probationer who is suspected of violating a condition of his probation has a right to be released on bail by a court other than the court placing him on probation.

2. With the enactment of the Criminal Code and the Probation and Parole Act what procedure must be followed in order to revoke an order suspending sentence?

CONCLUSIONS

1. Yes.

2. See analysis.

OPINION

ANALYSIS

Modern criminal law is geared to the rehabilitation of the criminal insofar as possible. By granting probation to certain defendants it is felt that rehabilitation is best achieved by:

(1) preserving the defendant from harmful associations with hardened criminals;

(2) guiding the defendant's life under the supervision of a probation officer; and,

(3) avoiding the disruption of the defendant's family.

Although the granting of probation is a matter of grace, once it has been granted the probationer has a vested right to his conditional liberty and he may not be deprived of this right without due process of law. **Ex parte Lucero,** 23 N.M. 433, 168 Pac. 713 (1917).

It is the purpose of this opinion to set forth the procedure that must be followed in the revocation of a suspended sentence in order not to deprive a probationer of his liberty

without due process of law. It will be seen that this involves a change in the present arrest procedure used by the board.

The New Mexico Constitution provides that " **all** persons shall be bailable by sureties, except for capital offenses when the proof is evident or the presumption great . . ." New Mexico Constitution, Article II, Section 13. (Emphasis added). The Probation and Parole Board does not contend that bail cannot be authorized where a probationer is arrested to determine whether a violation of his probation has in fact occurred. (See Arrest Order, Form No. 9). There is judicial authority to support this position of the board. See **Bickley v. United States,** 24 F.2d 481 (5th Cir. 1928) where the court held that a Federal Statute authorizing bail in all criminal cases applied to defendants arrested in order to determine whether suspended sentence should be revoked.

The only question then is whether bail may be authorized by a district court other than the court granting probation.

Section 41-4-1, N.M.S.A., 1953 Compilation provides that:

"When a warrant is issued for the arrest of any person . . . upon . . . complaint of **any officer** authorized to issue such warrant . . . the officer issuing . . . such warrant, must make an order to admit the defendant . . . to bail . . . ." (Emphasis added).

Section 41-4-3, N.M.S.A., 1953 Compilation provides that:

"In case of an arrest by virtue of any warrant as provided in this article, in a county other than that in which such warrant was issued, the officer making such arrest, if so required by the defendant, shall take him before some authorized officer of the county in which the arrest was made, for the purpose of having him admitted to bail . . . ."

Thus it appears that a probationer, arrested in a county other than the county which granted him probation, has a right to be admitted to bail in the county in which he is arrested.

The only problem occurs when the director makes an arrest without a warrant (Section 41-17-28.1, N.M.S.A., 1953 Compilation). This probably does not occur very often and probably should not be utilized when arresting suspected probation violators who are not presently within the jurisdiction of the court which granted probation.

In all other cases a probationer may not be arrested unless the arresting officer has an actual warrant or a written statement which is sufficient warrant. (Section 41-17-28.1 (3), N.M.S.A., 1953 Compilation).

If a criminal charge is pending in a county other than the county which placed the defendant on probation, the director shall not proceed against the defendant until the subsequent criminal charge is disposed of. Once the director proceeds against a probationer for violation of a condition of his probation, the probationer must be taken,

without delay before the court which granted the defendant his probation. (Section 40A-29-20, N.M.S.A., 1953 Compilation).

If the violation of probation is not a criminal offense the defendant should be allowed bail and directed to appear without delay, before the district court which granted his probation. At which time he must answer the alleged violation. (Section 40A-29-20, N.M.S.A., 1953 Compilation (P.S.). If he denies the violation he shall remain free on bail until his hearing which must follow not less than 5 days nor more than 10 days after his first appearance. (Section 40A-29-20, N.M.S.A., 1953 Compilation).

It is well settled law in New Mexico that a defendant may not be committed under a suspended sentence until he has been given notice of the alleged violation of his probation and he has had an opportunity to be heard. To deny a defendant either of these rights is to deny him his constitutional right of liberty without due process of law. **Ex parte Lucero,** 23 N.M. 433, 168 Pac 713 (1917); **State v. Peoples,** 69 N.M. 106, 364 P.2d 359 (1961); New Mexico Constitution, Art. II, Section 18.

Notice, to be a meaningful constitutional right, must be given prior to the time of hearing, otherwise the defendant would not be given an adequate opportunity to prepare a defense to the alleged violation of his probation.

Our legislature enacted two separate statutes concerning the revocation of probation during the 1963 Session. The first to become law was Section 40A-29-20 of the Criminal Code. This section sets forth a procedure which gives the probationer adequate notice of an alleged violation and also a right to a hearing. Subsequently the governor signed into law the Probation and Parole Act. Section 41-17-28.1 of this act does not provide for mandatory notice to the probationer before revocation of his probation, thus creating a question of constitutionality.

It is a general rule that where two acts on the same subject matter are passed during the same session of the legislature and these statutes are irreconcilable the latter statute prevails. **State v. Montiel,** 56 N.M. 181, 241 P.2d 844. However, if at all possible the two statutes must be interpreted together so as to give meaning to both laws. **Mendoza v. Acme Transfer Co.,** 66 N.M. 32, 340 P.2d 1080. There is a third general rule applicable here, that is, a statute is always presumed to be constitutional and where necessary a constitutional meaning will be inferred to preserve validity. **United States v. Rumeley,** 345 U.S. 41; Sutherland, **Statutory Construction,** Section 5904 (3rd Ed. 1943). It must be presumed that the legislature intended the Probation and Parole Act to be read along with the Criminal Code provisions concerning revocation of probation. Both consistency and constitutionality may be achieved by reading the notice provisions of the Criminal Code as a part of the procedure outlined in Section 41-17-28.1, supra, of the Probation and Parole Act.

It is suggested that the following procedure be followed in revoking an order suspending sentence. An arrest may be accomplished in one of the four following ways:

(1) The district court which placed the defendant on probation may issue a warrant upon the filing of a petition by the district attorney. Section 40A-29-20 and 41-17-28.1 (1), 1953 Compilation;

(2) The district court which placed the defendant on probation may issue a notice to appear to answer a charge of violation. The charge presumably would be brought by the probation office. Section 41-17-28.1 (2) N.M.S.A., 1953 Compilation;

(3) The director of the Probation and Parole Board may arrest the probationer without warrant. Section 41-17-28.1 (3), N.M.S.A., 1953 Compilation;

(4) A written statement issued by the director may be used as a warrant for arrest by an officer deputized by the director. The statement must set forth that in the director's judgment there has been a violation of probation. Section 41-17-28.1, (3), N.M.S.A., 1953 Compilation.

After arrest the defendant must be "brought without delay before 'the court' . . . ." ("the Court" presumably referring to the court which placed him on probation.) Section 40A-29-20, N.M.S.A., 1953 Compilation.

A defendant arrested for violation of probation in another jurisdiction within the state should be allowed bail in the jurisdiction in which he was arrested. He should be directed to appear, without delay, before the district court which placed him on probation.

In the case of a defendant who is being held on a subsequent criminal charge in a jurisdiction other than the one which placed him on probation, perhaps the better procedure would be for the board to delay proceeding against him for violation of probation until the subsequent charge is disposed of.

If the defendant was arrested in the jurisdiction of the district court which placed him on probation bail should be set at this first appearance, the first appearance being immediately after arrest. Section 40A-29-20, N.M.S.A., 1953 Compilation.

At the time of the defendant's first appearance, the court must read the petition prepared by either the district attorney (Section 40A-29-20) or by the Director of the Board of Probation and Parole (Section 41-17-28.1, N.M.S.A., 1953 Compilation). If the defendant denies the violation a hearing must be set by the court within 10 days, but not sooner than 5 days. (Section 40A-29-20, N.M.S.A., 1953 Compilation).

In summary the procedure set forth in the Probation and Parole Act for revocation of a suspended sentence might possibly be held unconstitutional if it did not have to be read along with the procedure provided under the Criminal Code for the revocation of suspended sentences.

By reading the two acts as consistent and constitutional it is concluded that a probationer arrested upon an alleged violation of his probation must be brought without delay before the court which placed him on probation and notified of the violation. If he denies the allegation a hearing must be set for not more than 10 days nor less than 5 days after his first appearance.

The defendant should be admitted to bail during the 5 to 10 day period subsequent to his first appearance before the court when arrested in the jurisdiction which placed him on probation. If arrested in another jurisdiction he should be immediately taken before an officer authorized to set bail. At this time he should be admitted to bail and directed to appear without delay, before the court which granted him probation for further proceedings.