

Opinion No. 65-213

October 28, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Oliver E. Payne, Deputy Attorney General

TO: Joseph F. Baca, Assistant District Attorney, First Judicial District, P.O. Box 2041, Santa Fe, New Mexico

QUESTION

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1. Does a convicted defendant on probation have a right to file an affidavit of disqualification in a hearing on revocation of probation to have the judge who originally acted in his case disqualified?
2. Would the fact that the original sentence was suspended or deferred make a difference in the defendant's right to file an affidavit of disqualification?
3. Is the hearing on revocation pursuant to Section 41-17-28.1 N.M.S.A., 1953 Compilation, a continuation of the original order placing the defendant on probation?

CONCLUSIONS

1. See Analysis.
2. No.
3. Yes.

OPINION

{*347} ANALYSIS

Once a party to a judicial proceeding has "tested the mind" of the court" he will not thereafter be allowed to disqualify the judge pursuant to Section 21-5-8, N.M.S.A., 1953 Compilation (P.S.), **State v. Hester**, 70 N.M. 301, 373 P. 2d 541. The rule is more simply stated by saying that once the judicial discretion has been called into lay by a party, an affidavit of disqualification is untimely. **Hill v. Patton**, 43 N.M. 21, 85 P. 2d 75; **State v. Hester**, supra.

In **State v. Nelson**, 65 N.M. 403, 338 P. 2d 301, the rule was applied with the result that where a new trial was ordered in a criminal case the defendant had no right to file an affidavit of disqualification to disqualify the judge who presided over the original trial

without objection. In the same case the Court distinguished a California decision cited to it which had allowed such disqualification by noting that the trial judge there had expressed his opinion prior to the new trial that the defendant had sworn falsely. In speaking for a unanimous Court, Justice Compton said:

". . . If we had such an extreme case before us, we too might well hold that fundamental justice would require the disqualification of the judge." **State v. Nelson**, supra.

In our opinion the rule applies in like manner to the hearing on violation of probation authorized by 41-17-28.1, supra. Where the judge in the original trial of the alleged probation violator has performed the judicial function without objection, and where that judge has not shown express prejudice toward the convicted probationer prior to the hearing for violation of probation, that judge may not be disqualified by the probationer.

The rule is that an affidavit of disqualification may not be filed after a party has "tested the mind" of the court or acceded to the judicial authority wielded by a judge. Therefore, in the absence of express prejudice, the defendant cannot demand disqualification of the original trial judge regardless of whether the sentence was suspended or deferred.

It is our opinion that the hearing on revocation authorized by Section 41-17-28.1, supra, is a continuation of the original probation order. It was held in the case of **Ex parte Bates**, 20 N.M. 542, 151 P. 698, L.R.A. 1916 A, 1285, that a court which has power to make an order suspending its judgment in criminal cases necessarily, upon a violation of such order, has the power to revoke the same and commit the accused. It has also been held that a hearing to determine if there has been a violation of the conditions of probation is not a trial but merely an inquiry into whether the probation conditions have been breached. **Ex parte Bates**, supra, **Ex parte Lucero**, 23 N.M. 433, 168 P. 713, L.R.A. 1918C, 549, **State v. Peoples**, 69 N.M. 106, 364 P. 2d 359. These hearings, therefore, may be informal. **Ex parte Lucero**, supra, **State v. Peoples**, supra, Section 41-17-28.1 (B), supra.

The foregoing merely points out that the court granting probation retains jurisdiction to superintend the conditions of probation. The court retains jurisdiction to revoke probation for breach of those {**348*} conditions, and Section 41-17-36, N.M.S.A., 1953 Compilation, points out that those conditions may be modified. Therefore, until the end of the period of probation the court imposing the probation has jurisdiction to revoke or modify it. In fact this retention of jurisdiction is akin to the continuing jurisdiction which a court has to modify its orders in divorce proceedings. The hearing for revocation of probation is a continuation of the order placing the defendant on probation.