

Judge Nadeau:

I am sorry that I could not respond to your questions earlier, but the press of business at Judicial Arbitrator Group, including an emergency hearing delayed my input.

You wrote to me stating:

I have received two inquiries that arose from comments made by Melynda Benjamin in a presentation entitled *Zealous Advocate? -- Defining the Defense Counsel Role*". I did not see the presentation. The concerns expressed are:

- 1) Several of our defense attorney team members were pretty concerned that the message during the session was to demand a contested, adversarial hearing before any sanctions are imposed, regardless of whether the sanction was jail or community service. One specific statement was that defense counsel are committing professional misconduct if they allow a sanction that required a participant to observe court for a day without requesting an adversarial hearing.
- 2) Several of our defense attorney team members were pretty concerned that the message during the session was to demand a contested, adversarial hearing before any sanctions are imposed. When offenders plead into drug court, they waive their right for their own attorney and understand that the public defender is a member of the team. They do receive their own counsel and a full blown hearing for termination hearings.

Although these two concerns are related, they implicate different Constitutional rights. The first inquiry involves a due process Fifth and Fourteenth Amendment analysis. The second inquiry entails right to counsel Sixth Amendment scrutiny. Thus, I see the issues as:

- A. When is a drug court defendant entitled to some type of hearing for allegedly non-compliant conduct?
- B. Does the right to counsel reattach, when the drug court participant has previously validly waived the right to counsel, but now faces a sanctioning process?

First issue: The right to a hearing

Defense counsel may have the cart before the horse. The drug court defendant is not even potentially entitled to a hearing unless he/she denies the allegation that they violated some term of the drug court contract or drug court probation. If they admit, you can move to sanctioning, but you should invite the defendant to allocute before determining the consequence. From your summary of what was said at the presentation, it appears that defense counsel is basing the request for a hearing on the potential sanction to be imposed, not the conduct of the drug court participant. Key Component # 2 states: "Using a non-adversarial approach, prosecution and defense counsel promote public safety, while protecting participants' due process rights." This Key Component contemplates that where the defendant has engaged in the proscribed conduct, he/she will admit it. The court will consider favorably the candor. When the defendant denies the conduct, and the consequence potentially implicates a liberty or property interest, due process would dictate some type of hearing. It seems that defense counsel is suggesting that for a certain set of potential consequences, the prosecution should be put to its proof—regardless of the defendant's conduct. This is very problematic on acceptance of responsibility. The foregoing may beg the question—if the defendant denies the conduct, what potential penalty would dictate

some type of hearing? Undoubtedly, jail is a sufficient potential consequence to require a hearing. Beyond that, I am less certain. By analogy, I refer to the cases that modify the terms of probation without a hearing.

The United States Supreme Court has established certain minimal procedural protections prior to revocation of parole or probation, including a hearing, see *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973), but has not considered whether such procedures apply to modifications of the conditions of supervision for persons on probation or parole.

In *Dastas v. Ross*, *Dist. Court*, D. New Jersey 2012¹

the court held that defendant must establish a liberty interest entitled to protection by the Due Process Clause. In *Dastas*, the two liberty interests identified were drinking alcohol and moving freely without GPS monitoring. Identification of due process requirements generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Applying this standard, courts have reached varying conclusions regarding the procedures required before, or after, changes to conditions of supervision, depending upon the specific circumstances. Cf., e.g., *Skipworth v. United States*, 508 F.2d 598 (3d Cir. 1975) (due process does not require a hearing before extension of a term of probation; however, as a matter of Court's supervisory authority, and because of potential for prejudice, District Courts in Third Circuit were thereafter required to provide notice and advise federal probationer of his right to a hearing with assistance of counsel); *Meza v. Livingston*, 607 F.3d 392 (5th Cir. 2010) (where offender was never convicted of a sex crime, before sex-offender conditions can be imposed on him, he is entitled to notice, an evidentiary hearing before an impartial decision maker, and the right to confront and cross-examine witnesses, unless good cause is shown); *Jamgochian v. New Jersey State Parole Board*, 196 N.J. 222 (N.J. 2008) (sex offender who has been successfully supervised in society for three and one-half years is entitled to "reasonable notice and an opportunity to be heard," which may consist of a response by letter and/or affidavit, within a reasonably brief period of time after imposition of an 11-hour per day curfew from 8:00 p.m. to 7:00 a.m.; to merit a hearing, the supervised offender must deny the allegations or contest the conclusions to be drawn from the allegations or the rationale supporting the curfew); *Dordell v. State of Delaware*, 850 S.2d 302, 2004 WL 1277160 (Del. Supr. 2004) (post-deprivation judicial review of amended condition prohibiting contact with minors is sufficient to satisfy due process); *State v. Smith*, 769 A.2d 698 (Conn. 2001) (due process does not require notice and a hearing with benefit of counsel prior to an order modifying terms of sex offender's probation to include therapy); *United States v. Silver*, 83 F.3d 289, 292 (9th Cir. 1996) (extension of probation period); *Forgues v. United States*, 636 F.2d 1125, 1127 (6th Cir. 1980) (same); *United States v. Cornwell*, 625 F.2d 686, 688-89 (5th Cir. 1980) (same); *United States v. Carey*, 565 F.2d 545,

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546-47 (8th Cir. 1977) (same); *Edwards v. State*, 216 Ga. App. 740, 741, 456 S.E.2d 213 (1995) (adding condition of completing sex offender treatment); *People v. Britt*, 202 Mich. App. 714, 716-17, 509 N.W.2d 914 (1993) (adding condition that defendant wear electronic monitor or tether); *Ockel v. Riley*, 541 S.W.2d 535, 544 (Mo. 1976) (extension of probation period); *State v. Zeisler*, 839 Ohio App. 3d 138, 141, 483 N.E.2d 493 (1984) (adding condition that defendant complete probation diversion program); *Sanchez v. State*, 603 S.W.2d 869, 870 (Tex. App. 1980) (adding condition that defendant ingest antabuse); but see cases holding entitlement to counsel, thus inferring right to hearing: *State v. Sommer*, 878 P.2d 1007, 1008 (N.M. Ct. App. 1994) (a modification of the terms of probation is a critical stage of the proceedings, where the right to counsel attaches, at least where the modification adds significant terms to probation) and *State v. Kouba*, 709 N.W.2d 299, 299 (Minn. Ct. App. 2006) (a modification of the terms of probation is a critical stage of the proceedings, where the right to counsel attaches, at least where the modification adds significant terms to probation)

The Indiana Appellate court, in *Collins v. State*, 911 N.E.2d 700 (Ind.Ct.App.2009), aptly summarized the majority view:

We reach the same overall conclusion here as the Skipworth Court and the other federal and state courts that have followed it, namely, that altering the terms of probation, like a probation extension, does not trigger the protections of due process that obtain in a revocation proceeding.

Quite simply, an expansion of the terms of probation is not as grievous a loss as its revocation; whatever the impact of the additional terms on liberty, that impact does not approach that of incarceration. As the Connecticut Supreme Court has stated, "The primary loss occasioned by a modification of a condition of probation is still only the possibility of future revocation, a loss that potentially occurs only if the condition is not met." *State v. Smith*, 255 Conn. 830, 769 A.2d 698, 704 (2001). "Because a probationer is entitled to a hearing prior to revocation, the potential of loss caused by modifying a condition of probation is not considered sufficiently grievous to require a hearing." *Id.* at 705. We are left, then, with a merely potential loss that can be addressed should Collins ever be accused of violating the terms of his probation, at which time he would receive the due process detailed in Indiana Code section 35-38-2-3.

So what are my recommendations on this issue. First, check your probation statutes and see what process is necessary for a modification of probation. Second, while a hearing may not be strictly required for a modification, it doesn't mean you shouldn't hear the defendant's side of the story—you should. Third, for additional terms that are less than a potential jail sanction, but more than something that might impose a few (say 6) hours on defendant time, such as 20 hours of community service, a truncated hearing with simple statements of the alleged basis of the violation, which the defendant denies, and once again, an opportunity for the defendant to make a statement, should satisfy due process concerns.

Second Issue: When does the right to counsel reattach?

We are all familiar with *Faretta v. California*, 422 U.S. 806, 822 (1975), holding that a defendant generally has the right to represent him/herself. However, the court should engage in

a searching inquiry before allowing waiver of counsel. *Iowa v. Tovar*, 541 U.S. 77, 92 (2004) Of course, a defendant who has waived his right to counsel may nonetheless re-assert that right. *Robinson v. Ignacio*, 360 F.3d 1044 (9th Cir. 2004) The case law above is split on whether right to counsel exists in the analogous situation modification of probation. Compare for example: *State v. Sommer*, 878 P.2d 1007, 1008 (N.M. Ct. App. 1994) (a modification of the terms of probation is a critical stage of the proceedings, where the right to counsel attaches, at least where the modification adds significant terms to probation) and *State v. Kouba*, 709 N.W.2d 299 (Minn. Ct. App. 2006) (same) with *DeMillard v. State*, 190 P.3d 128 (Wyo. 2008) (probation modification proceedings not critical stage of proceedings and therefore no right to counsel) I do believe that where defendant denies the factual basis of an alleged violation and jail is a potential sanction, counsel should be appointed, unless the defendant waives counsel. As stated by the Supreme Court in *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972):

“Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts.”

I am certainly aware of *Scott v. Illinois*, 440 US 367 (1979), holding that the Sixth and Fourteenth Amendments do not require a state to appoint counsel for a defendant who is charged with an offense for which imprisonment is authorized, but not imposed. However, if you do not provide counsel when requested, a jail sanction cannot be imposed. If the violation contemplates a lesser sanction, such as 6 hours in a jury box or 5 hours of community service, I don't think the right to counsel attaches. For the upper intermediate sanctions—20 hours of community service—I would state that the better practice is to offer counsel. Of course, check your state—your state due process requirements could be more stringent than federal standards.

I am sorry this is so long. As Mark Twain observed: “If I had more time, I would have written you a shorter letter.” I hope this has been helpful. After you have had a chance to digest this and speak with your team, let me know and I will follow up with a phone call. my best wgm

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