

Court of Appeals of Iowa.

Howard DEERING, Appellant,
v.
STATE of Iowa, Appellee.

No. 98-1473.

Sept. 29, 1999.

Appeal from the Iowa District Court for Ida County, Dewie J. Gaul, Judge.
David P. Jennett of Murray & Murray, P.L.C., Storm Lake, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, and Kirk E. Goettsch, County Attorney, for appellee.

Considered by Streit, P.J., and Mahan, and Zimmer, JJ.

ZIMMER, J.

*1 Howard Deering appeals the denial of his application for postconviction relief. Deering's application challenged the validity of his stipulation in a prior probation revocation proceeding that he committed a violation of probation. He contends his consent to the revocation of his probation was obtained in violation of his constitutional due process rights because he was misinformed that he had a right to appeal and to present further evidence. We affirm.

I. Background Facts and Proceedings. In 1991, Deering plead guilty to the felony offense of fraudulent practice in the second degree and was sentenced to a term of imprisonment not to exceed five years. His sentence was suspended and he was placed on probation for five years and ordered to pay restitution and court costs.

In April 1994, the State filed an application to revoke Deering's probation. The State alleged that Deering had committed at least five violations of the conditions of his probation. In December 1995, the State filed a supplement to its application, contending Deering had committed a further violation of his probation by being convicted of a federal felony in Nebraska in December 1994.

In November of 1997, Deering was finally arrested in Missouri on a bench warrant. On January 8 or 9, 1998, he was brought back to the Ida County jail and remained there until a probation revocation hearing on January 13, 1998. Prior to the hearing, Deering consulted with privately

retained counsel in Iowa. A second attorney from the St. Louis area also assisted with his case. At the hearing, Deering appeared with counsel and admitted he had violated the terms and conditions of his probation as alleged in the State's application and amendment. The district court revoked Deering's probation and ordered him to serve an indeterminate term of incarceration not to exceed five years, as provided in Deering's original sentence. The court awarded credit for time served and, pursuant to an agreement negotiated with the State, Deering was granted until March 2, 1998, to submit himself to the custody of the Ida County sheriff.

On January 21, 1998, Deering directly appealed from the sentence imposed by the probation revocation court. In May of 1998, his appeal was dismissed by the Iowa Supreme Court on motion of the State.

Deering filed an application for postconviction relief. He alleged his probation had been unlawfully revoked and that his sentence should be vacated. The district court denied his application for postconviction relief following a hearing held July 10, 1998. Deering has appealed from the dismissal of his application for postconviction relief. He raises two similar claims, both of which are founded upon due process considerations. He first contends his decision to waive part of his due process rights at his probation revocation hearing was unintelligent because he believed he had a right to appeal. He also claims he was affirmatively misinformed about the nature and right of his appellate remedy, rendering his decision to stipulate to a probation violation unintelligent. We find neither claim persuasive.

*2 II. Scope of Review. Our scope of review on postconviction appeal is generally for correction of errors at law. *State v. Allen*, 402 N.W.2d 438, 440 (Iowa 1987). Postconviction relief actions alleging constitutional claims are evaluated upon an examination of the totality of the circumstances, the equivalent of a de novo review. *Carroll v. State*, 466 N.W.2d 269, 271 (Iowa App.1990).

III. The Merits. Probation revocation is a civil proceeding and not a stage of criminal prosecution. *Ghenon v. Scarpelli*, 411 U.S. 778, 782, 93 S.Ct. 1756, 1759, 36 L.Ed.2d 656, 661-662 (1973). The rules of criminal procedure do not apply and "the proceedings can be informal, even summary." *State v. Lillibridge*, 519 N.W.2d 82, 83 (Iowa 1994). Because probation revocations involve the loss of liberty, certain due process rights are applicable to the hearing. *Id.* Because due process is a flexible concept, each case must be decided on its own particular facts. *Barker v. State*, 479 N.W.2d 275, 278 (Iowa 1991).

A defendant in either a probation or parole revocation proceeding is constitutionally entitled to: (1) written notice of the claimed violations; (2) disclosure of the evidence against the defendant; (3) an opportunity to be heard in person and to present witnesses and documentary evidence; (4) a right to confront and cross-examine adverse witnesses unless the hearing officer specifically finds good cause for not allowing confrontation; (5) a neutral and detached hearing body; (6) a written statement by the fact finders as to the evidence relied on and the reasons for revoking parole or probation. *Calvert v. State*, 310 N.W.2d 185, 188 (Iowa 1981). The due process requirements may be waived. See *Patterson v. State*, 294 N.W.2d 683, 684 (Iowa 1980).

Our de novo review of the record convinces us Deering knowingly waived his due process rights. Deering had notice of and attended the revocation hearing. He was represented by privately retained counsel. There were several discussions between counsel and Deering regarding possible defenses to the alleged violations. His counsel contacted potential witnesses, as requested by Deering, and concluded that none would support the defendant. Counsel discouraged a presentation of obviously frivolous defenses based upon alleged conspiracies to frustrate Deering's rights. Counsel discussed the possibility of continuing the hearing to facilitate Deering's gathering of information for a defense. Counsel informed Deering they could present a partial defense but several of the violations could not be disproved. Deering admitted to counsel that he did not have a defense to the majority of alleged violations, including his conviction of a federal felony offense while on probation. In the face of overwhelming proof that he had violated the terms and conditions of his probation, Deering agreed to a negotiated settlement. He declined to contest the allegation of a probation violation by offering evidence, instead admitting the violation. At no point during the hearing did Deering express displeasure with the conduct of his counsel or the court.

*3 Deering contends his due process rights were violated because he was mis-informed of his right to appeal by the court or counsel. The record does not support Deering's contention that the concept of appeal contributed to his decision to stipulate to a probation violation. Deering's counsel testified that she never discussed the right of appeal with Deering and never suggested to Deering that his claims would be better presented on appeal. At no point during the hearing did Deering express the desire to appeal. As a result of the agreement between Deering and the State regarding disposition of the application to revoke probation, a revocation order was prepared in conformance with the agreement. The agreement was signed by Deering and his counsel. The last line of the proposed order referred to an appeal bond. The amount of the bond was left blank when the order was prepared. The record shows a brief discussion occurred near the close of the hearing between the Ida County Attorney and the trial court regarding what the appeal bond would be. At some point in time after that discussion was held, the court established an appeal bond in the sum of \$2,000.FN1 The court's comment regarding an appeal bond, made after Deering had already waived due process rights inherent in a probation revocation proceeding, could not have influenced Deering's decision to stipulate to a revocation.

FN1. No appeal bond was actually available. Direct appeal is not allowed from a probation revocation. Allen, 402 N.W.2d at 441; see Iowa Code § 822.2. Post-conviction relief is the sole avenue to seek review of a probation revocation. Id.

Deering's own testimony indicates that he was not told he had the right to appeal. He testified he assumed he could appeal based upon the judgment that he received following the hearing which fixed an appeal bond in the amount of \$2,000. Again, such information could not have influenced or misinformed Deering's waiver precisely because it occurred post-waiver. Deering's contention that his decision to admit the probation violation was not intelligent because he thought he had a right to appeal is without merit.

Even if we were to assume Deering stipulated to a violation of probation because he was misinformed about his right to appeal, we do not believe he is entitled to relief. After his direct

appeal was dismissed, Deering pursued a postconviction relief action in which the district court afforded him the opportunity to present evidence to establish that his probation should have not been revoked. The court allowed him to introduce evidence he claimed he would have presented during the probation violation hearing. The postconviction court did not find Deering's evidence provided any basis for concluding his probation should not be revoked. At the postconviction hearing, Deering again conceded he had been convicted of a felony offense in federal court while on probation. He conceded that a conviction was a violation of his probation. The postconviction court properly denied Deering's claim for relief.

AFFIRMED.

Iowa App.,1999.
Deering v. State
Not Reported in N.W.2d, 1999 WL 775998 (Iowa App.)