63 Wis.2d 535

STATE ex rel. David J. PLOTKIN, Appellant,

v.

DEPARTMENT OF HEALTH AND SOCIAL SERVICES et al., Respondents.

No. 507.

Supreme Court of Wisconsin.

May 20, 1974.

An appeal was taken by defendant from an order of the Milwaukee County Circuit Court, Hugh R. O'Connell, J., which quashed a writ of certiorari directed to the Department of Health and Social Services for the purpose of reviewing a revocation of probation entered at an earlier date. The Supreme Court, Heffernan, J., held that the Department did not abuse its discretion in revoking defendant's probation, where defendant admittedly, on three occasions, violated a probation condition prohibiting him from entering certain bar which had been a focal point of his commercial gambling offenses, where such condition of probation went to the heart of his criminal activities, and where the Secretary, prior to reaching his decision to revoke, had full knowledge of the facts as arrived at after a due process procedure, notwithstanding the absence of any evidence showing that defendant engaged in any illegal activities when he entered the bar.

Affirmed.

1. Criminal Law ⇐982.9, 982.9(6)

Discretion whether to hold a hearing on charge of violating probation or whether to revoke probation rests within sound discretion of the Department of Health and Social Services, and there must be evidence that the Department acted with full knowledge of the facts on a basis consistent with the purposes of probation and with the applicable law. W.S.A. 973.10(2).

2. Criminal Law ⇐982.9(1)

The term "good risk," as used in reference to a probationer, is not a word of art encompassing within it any concept of a clearly defined nature; rather, the most that can be said for the term is that it is a shorthand expression which admonishes courts or administrative agencies that, before revoking probation, there should be an exercise of discretion in respect to whether the rehabilitation of the criminal can continue to successfully be accomplished outside the prison walls. W.S.A. 973.10(2).

See publication Words and Phrases for other judicial constructions and definitions.

3. Criminal Law ⇐982.9(1)

Guidelines recommended by the American Bar Association "Standards Relating to Probation" properly set forth the duty of a court or administrative body in exercising its discretion in respect to possible revocation of probation, and those standards would accordingly be adopted. W.S.A. 973.10(2).

4. Criminal Law ⇐982.9(1)

Factual determination that a violation of a condition of probation has occurred triggers the exercise of the revoking authority's jurisdiction to revoke or not revoke in its discretion. W.S.A. 973.10(2).

5. Criminal Law ⇐982.9

Discretion, in respect to the question of whether to revoke probation, entails not only the purposes of decision making on the basis of the relevant facts, but also requires that the decision be consonant with the purposes of the established law or other guides to discretion. W.S.A. 973.10(2).

6. Criminal Law ⇐982.9(1, 5)

Department of Health and Social Services did not abuse its discretion in revoking defendant's probation, where defendant admittedly, on three occasions, violated probation condition prohibiting him from entering certain bar which had been

a focal point of his commercial gambling offenses, where such condition of probation went to the heart of his criminal activities, and where the Secretary, prior to reaching his decision to revoke, had full knowledge of the facts as arrived at after a due process procedure, notwithstanding the absence of any evidence showing that defendant engaged in any illegal activities when he entered the bar. W.S.A. 973.-10(2).

This appeal is taken from an order of the circuit court which quashed the writ of certiorari directed to the Department of Health and Social Services for the purpose of reviewing a revocation of probation which had been entered at an earlier date in the criminal case of State of Wisconsin v. David J. Plotkin. After a plea bargain by which eight counts of commercial gambling were reduced to five, David J. Plotkin pleaded guilty and was sentenced on August 1, 1972, to one year's imprisonment on each count, with the sentences to be served concurrently. The execution of the sentences were stayed, and Plotkin was placed on two years' probation.

As a condition of probation, Plotkin signed an agreement which set forth that he would abide by the usual probation terms in respect to reporting to his probation officer and other routine matters that are included in probation agreements. In addition, at the hearing on which probation was granted, the trial judge specifically added a seventh condition: "I will not go into The Clock Bar 715 N. 5th St Milwaukee Wisconsin from 11/1/72-8/1/74." This special provision was separately initialed by Plotkin and was incorporated into the agreement signed by him on August 1, 1972. At the court hearing, the sentencing judge stated that Plotkin was to stay "completely away from the premises known as the Clock Bar."

The reason for this condition is made clear from the sentencing court's record. The record and the subsequent hearing on the revocation show that the Clock Bar had been the scene of the crime. It was the place from which Plotkin admittedly carried on repeated violations of the statutes prohibiting commercial gambling.

Because Plotkin had been in partnership with his father in the ownership of the Clock Bar, he was given a three-month period of grace during which he could enter the bar for the termination of his business interests, and the condition of the probation directing him not to go on those premises was not effective until November 1, 1972. Nevertheless, Plotkin violated that specific prohibition.

In early June, Plotkin told Jack Jorgensen, his probation officer, that he had gone into the bar five or six times to pick up his mail and to talk to the bartender or to have a cup of coffee. At that time, Plotkin said that he considered it a violation of his constitutional rights to be prohibited from going into the bar if he was not indulging in any illegal activities.

He was told by his probation officer that going into the bar was contrary to an express condition of his probation and that it was without the probation officer's approval and Plotkin should not continue to do it. Nevertheless, Plotkin continued to go to the Clock Bar, and he was seen by agents of the State Department of Justice at the bar on June 26, June 27, and July 10, 1973. Plotkin remained in the bar on those occasions from twenty-five to thirty minutes, and on each occasion he left before 11:00 a. m., the time when the bar opened. Plotkin was observed in the barroom during those times and was never observed in any involvement in any illegal activity. These violations of the condition of probation were reported to the correctional division of the Department of Health and Social Services, and Plotkin's probation officer recommended to the Department that a hearing be held for the purpose of determining whether Plotkin's probation should be revoked. It appears from other corre-

spondence of the Department in the file before this court that Jorgensen recommended the revocation of probation.

A hearing was held to determine whether probation should be revoked. At that time it was established beyond doubt that Plotkin had violated that condition of his probation on several occasions. Plotkin personally appeared at the hearing and admitted that he had told Jorgensen that he considered it a violation of his rights to be prohibited from going into the bar. He felt that he should be exonerated from the violation because he had not indulged in any illegal activities and that he had been completely honest and open in respect to his admissions to Jorgensen. Plotkin admitted that he had been warned by Jorgensen not to go into the bar, but he said that he did not know that he risked going to jail for the violations and that, had he known, he would have made other arrangements for picking up his mail. He stated that, if his probation was continued, he would obey that condition.

Plotkin also admitted that the illegal incidents which had led to his convictions had occurred in the Clock Bar during the morning and sometimes as early as 10:30 a. m. At the hearing, the probation officer supervising Jorgensen stated that he had never had any trouble with him, that he had reported faithfully, that he had been employed during his period of probation, and that at all times Plotkin had kept him informed of his whereabouts and activities.

The question of the revocation of probation was heard by Donald R. Schneider, a hearing examiner for the Department, who summarized the testimony of the witnesses. On the basis of that testimony, he made specific written findings of fact that David Plotkin had violated a special condition of his probation by entering the Clock Bar on three separate occasions. He concluded that the Bureau of Probation and Parole in making the recommendation for the revocation of probation had not acted arbitrarily or capriciously. Nevertheless, the examiner recommended that Plotkin's probation be continued because, when Plotkin had voluntarily told his probation officer that he was going into the Clock Bar, his probation officer did not at that time prepare a violation report or commence revocation proceedings. He also considered the fact that the testimony showed no evidence of any illegal activities by Plotkin in the bar and that, as a result of the hearing, Plotkin now realizes the seriousness of the violation of this condition of his probation. Schneider made the recommendation to the Secretary of the Department of Health and Social Services, Wilbur J. Schmidt, that the probation be continued. That recommendation was not followed, and the Secretary entered an order on October 16, 1973, revoking Plotkin's probation. This order was combined with a warrant directing that Plotkin be apprehended and be taken to the Wisconsin State Prison for the service of his sentence. With the order and warrant was a written memorandum by the Secretary in which he gave as his reasons for the revocation:

> "He freely admitted violating a clearly understood, Court-imposed condition of probation on three separate occasions. Continued supervision is not possible unless rules are adhered to."

On October 27, 1973, Plotkin petitioned the circuit court for Milwaukee county for a writ of certiorari to review the Secretary's decision. He alleged that the Department's decision made by the Secretary was arbitrary and capricious.

The writ was issued by Circuit Judge Hugh R. O'Connell on November 19, 1973, and a hearing held the same day. The court found that Schmidt's action in revoking the probation was proper under the circumstances, and he affirmed the revocation, in effect quashing the writ.

An appeal from the circuit court's order was perfected on November 27, 1973.

Shellow & Shellow, Stephen M. Glynn, Milwaukee, for appellant.

Robert W. Warren, Atty. Gen., Robert D. Repasky, Asst. Atty. Gen., Madison, for respondents.

HEFFERNAN, Justice.

The only question before the court is whether the Department of Health and Social Services abused its discretion in revoking Plotkin's probation. On this appeal Plotkin acknowledges that he was afforded full substantive and procedural due process in respect to the notices and hearings that led up to the revocation of his probation. A claim that he was denied due process because he was not given an opportunity to respond to a separate memorandum of the Bureau of Probation and Parole to the Secretary subsequent to the hearing has been specifically abandoned on this appeal.

It is Plotkin's contention that a revocation of probation can be made only where the administrative officer has specifically found that the defendant was not a "good risk" for continued probation. He predicates this argument basically upon the language of the Wisconsin statute which confers the power of revocation on the Department of Health and Social Services under certain circumstances. That statute, sec. 973.10(2), Stats., provides:

> "If a probationer violates the conditions of his probation, the department may order him brought before the court for sentence which shall then be imposed without further stay or if he has already been sentenced, may order him to prison; and the term of the sentence shall begin on the date he enters the prison."

[1] Plotkin argues that by the use of the word, "may," the legislature clearly indicated its intention that the decisions to order a probation hearing or to order a revocation of the probation after a hearing were to be discretionary acts—that revocation does not follow of course a finding that a condition of probation has been violated. That position is correct. The discretion whether to hold a hearing or whether to revoke probation rests within the sound discretion of the Department, and there must be evidence that the Department acted with full knowledge of the facts on a basis consistent with the purposes of probation and consistent with the applicable law.

The argument that there must be a specific finding that the defendant is not a "good risk" and that such a finding must be a specific element discussed in the order of the secretary comes initially from Morrissey v. Brewer (1972), 408 U.S. 471, 483, 92 S.Ct. 2593, 33 L.Ed.2d 484, wherein the court stated:

> "Release of the parolee before the end of his prison sentence is made with the recognition that with many prisoners there is a risk that they will not be able to live in society without committing additional anti-social acts."

In that case, the United States Supreme Court, addressing itself specifically to the revocation of either parole or probation after it has once been granted, stated:

> "Implicit in the system's concern with parole violations is the notion that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole. The first step in a revocation decision thus involves a wholly retrospective factual question: whether the parolee has in fact acted in violation of one or more conditions of his parole. Only if it is determined that the parolee did violate the conditions does the second question arise: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation? The first step is relatively simple; the second is more complex. The second question involves the application of expertise by the parole authority in making a prediction as to the ability of the individual to live in society without committing antisocial acts. This part of the decision, too, depends on facts, and therefore it is important for the board to

know not only that some violation was committed but also to know accurately how many and how serious the violations were. Yet this second step, deciding what to do about the violation once it is identified, is not purely factual but also predictive and discretionary." (Pp. 479, 480, 92 S.Ct. p. 2599)

State v. Fuller (1973), 57 Wis.2d 408, 414, 204 N.W.2d 452, 454, also uses the term, "good risk." In *Fuller*, where it was evident that the terms of the probation had been violated, we said:

"The only question before Judge Coffey was whether or not the defendant, given his past conduct of violating the conditions of his probation, was still a 'good risk.'"

[2] While this term has been used in Wisconsin cases and has been used in numerous other cases throughout the country, no case which we have found or which has been brought to our attention clearly explains the meaning of the term, "good risk." We do not consider the term, "good risk," a word of art that encompasses within it any concept of a clearly defined nature. The most that can be said for the term is that it is a shorthand expression which admonishes courts or administrative agencies that, before revoking probation, there should be the exercise of discretion in respect to whether the rehabilitation of the criminal can continue to successfully be accomplished outside of the prison walls. The Department of Health and Social Services contends in its brief that:

". . . the 'risk' envisioned is broader than a risk that the probationer will commit more crime, or not obtain work, or violate other conditions. The 'risk' encompasses all of these as well as the public interests in the imposition of punishment and specific and general deterrence. . . ." (P. 6)

We have no dispute with the Department's definition as far as it goes, but we also believe that the additional question is posed: Will the continued probation be likely to further the rehabilitation of the criminal or will that rehabilitation be furthered by placing him in a closed society.

[3] We conclude that the guidelines recommended by the American Bar Association Standards Relating to Probation properly set forth the duty of a court or administrative body in exercising its discretion in respect to possible revocation of probation:

"5.1 Grounds for and alternatives to probation revocation.

"(a) Violation of a condition is both a necessary and a sufficient ground for the revocation of probation. Revocation followed by imprisonment should not be the disposition, however, unless the court finds on the basis of the original offense and the intervening conduct of the offender that:

"(i) confinement is necessary to protect the public from further criminal activity by the offender; or

"(ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or

"(iii) it would unduly depreciate the seriousness of the violation if probation were not revoked.

"(b) It would be appropriate for standards to be formulated as a guide to probation departments and courts in processing the violation of conditions. In any event, the following intermediate steps should be considered in every case as possible alternatives to revocation:

"(i) a review of the conditions, followed by changes where necessary or desirable;

(ii) a formal or informal conference with the probationer to re-emphasize the

necessity of compliance with the conditions;

"(iii) a formal or informal warning that further violations could result in revocation." American Bar Association, Standards Relating to Probation, p. 56.

We approve of these standards and adopt them.

[4] The standards, to which the appellant refers with approval, point out that the violation of a condition is a "sufficient ground for the revocation of probation." Accordingly, under those standards, as well as under the Wisconsin statutes, the factual determination that a violation of a condition has occurred triggers the exercise of the revoking authority's jurisdiction to revoke or not in its discretion. Here, the jurisdictional question is undisputed both as to a factual underpinning and the due process sequence of events that led to the ultimate decision by the Secretary.

The order of the Secretary recited that he had before him the whole record, the examiner's summary of the evidence and the examiner's recommendation. The record is undisputed, therefore, that, prior to the time the Secretary reached his decision, he had full knowledge of the facts as arrived at after a due process procedure. This element of discretion, an important one, demonstrates that the action was based upon consideration of the relevant facts rather than upon caprice.

[5] Discretion not only entails the process of decision making on the basis of the relevant facts but also requires that the decision be consonant with the purposes of the established law or other guides to discretion. In the instant case the Secretary, after an examination of the record, stated that the violation was not an isolated one, but was repeated upon three occasions. Thus, the Secretary, applying the "expertise" recognized in *Morrissey* concluded that, "Continued supervision is not possible unless rules are adhered to." We believe this to be another way of expressing guideline 5.1(a)(iii) of the American Bar Association Standards Relating to Probation to the effect that the failure to revoke under the circumstances, "would unduly depreciate the seriousness of the violation."

[6] The evidence elicited at the hearing supports the position of the Secretary that the adherence to the condition that was violated was an important—probably the most important—condition of probation. The Clock Bar was the scene of the defendant's commercial gambling activities. The trial judge, with good reason, believed that the persons with whom Plotkin was associating at the time of his crime were habitues of the Clock Bar. The prohibition against entering the bar was totally unrelated to the question of whether liquor was then being served. The evidence at trial and on the hearing for revocation showed that his commercial gambling offenses were on occasion committed on the Clock Bar premises before the bar was opened for service of liquor. This was not a nominal condition that was violated. Rather, the condition was one that went to the heart of the defendant's criminal activities. On oral argument counsel attempted to portray the condition itself as being unreasonable because Plotkin merely went into the bar to pick up his mail. The record reveals, however, the degree to which the presence of Plotkin in this particular bar had been inextricably intertwined with his criminal conduct.

It is also argued that Plotkin was not a man of violence, and that, therefore, he was not a risk to others or to society as a whole. The record bears out that Plotkin is probably unlikely physically to assault anyone, but the legislature has seen fit to conclude that gambling of the nature indulged in by Plotkin is a threat to society and to other citizens who may become enmeshed in the toils of the commercial gambler. Plotkin's return to his "locus operan-

di" contrary to the conditions of probation constituted a threat to society, to others, and to his own chances of rehabilitation. We do not look upon Plotkin's admission to his probation officer that he was going into the Clock Bar as evidence of openness or cooperation. Rather, it evinces a brazen disregard of the conditions to which he had voluntarily agreed as a portion of his plea bargaining agreement. We give him no plusses for the assertion to the probation officer that he was continuing to go into the bar because he felt the condition was "unconstitutional" and could not be enforced. He demonstrated a callous disregard for the court's judgment and decided to take the law and its interpretation into his own hands. Had he wished to challenge the condition, it would not have been necessary to defy the admonition of his probation officer, but that is what Plotkin did.

We conclude that the Secretary properly and in the exercise of due discretion revoked the probation of Plotkin. He summarized those considerations in the sentence that "Continued supervision is not possible unless rules are adhered to."

In view of the fact that the whole record was before the Department Secretary, including information in respect to the original offense and the reason for the imposition of the condition that the Clock Bar was not to be entered, it is apparent that the revocation was not the result of a capricious, arbitrary, and ironclad "no second chance" rule or the adherence to a rule for rule's sake. Here the condition that was violated went to the heart of the rehabilitative process and was integrally related to the risk that Plotkin would indulge in his old criminal habits to his detriment and the detriment of society.

We affirm the order of the trial court which in effect quashed the writ of certiorari and affirmed the revocation.

Order affirmed.

63 Wis.2d 320

Barbara TESCH, Respondent,

v.

Arthur TESCH, Appellant.

No. 138.

Supreme Court of Wisconsin.

May 7, 1974.

In a divorce action, the Circuit Court, Winnebago County, William E. Crane, Circuit Judge, granted a divorce and ordered property division and a payment by the husband toward the fees of the wife's attorneys, as well as the full fee of a guardian ad litem appointed for the children. The husband appealed. The Supreme Court, Wilkie, J., held that the trial court's consideration of misconduct on the husband's part as a factor in property division was not reversible error, in view of evidence of physical violence, though a jury found that the wife had committed adultery. The husband was not deprived of due process merely because he had no opportunity to cross-examine the wife's counsel and present evidence on the reasonableness of the attorneys' fee, where counsel for defendant did have opportunity to make recommendations to the court concerning such award. The trial court was not compelled to require a lesser contribution than it did from the husband, toward attorneys' fees, on the ground that part of the fee was in defense of the charge of adultery and that the jury found the wife guilty of adultery. The Court also held that where the wife had sufficient ability to pay part of the fee of the guardian ad litem for the children, the trial court abused its discretion in failing to order her to pay some part of such fee, and she would be ordered to pay 50% thereof.

Judgment modified; as modified, affirmed.