



Technical Assistance Practice Advisory
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Misdemeanor Probation Violation Hearings

Due Process Rights Of Defendant

A probationer's due process rights are less than those of a person accused of a crime. Gagnon v. Scarpelli, 411 U.S. 778, 36 L.Ed. 2d 656, 93 S.Ct. 1756 (1973). However, a probation revocation hearing must meet due process requirements. At a minimum, a probationer at such a hearing is entitled to the following:

- (a) written notice of the claimed violations of [probation or] parole; (b) disclosure to the [probationer or] parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation or] parole.

In re Boone, 103 Wn.2d 224, 231(1984) (quoting Scarpelli, 411 U.S. at 786) (overruled on other grounds by In re Pierre, 118 Wn.2d 321, 328 (1992)).

A probation department cannot impose new conditions of probation. The probation department can ask the court to impose new conditions, and the defendant is entitled to a hearing on whether those conditions are appropriate. See State v. Wilkerson, 107 Wn.App. 748 (2001). The probation department must advise the defendant of the right to a hearing before new conditions are imposed, and the court must ratify any new conditions of probation. State v. Williams, 97 Wn.App. 257 (1999).

Right to Counsel

A defendant is entitled to counsel at all probation revocation hearings. A court may not revoke or modify probation except at a hearing where a defendant has a right to counsel:

- (b) Revocation or modification of probation. The court shall not revoke or modify probation except (1) after a hearing in which the defendant shall be present and apprised of the grounds on which such action is proposed, or (2) upon stipulation of the parties.
The defendant is entitled to be represented by a lawyer and

may be released pursuant to rule 3.2 pending such hearing. A lawyer shall be appointed for a defendant financially unable to obtain one.

CrRLJ 7.6(b) (emphasis added). See also State v. Robinson, 153 Wn.2d 689, 694 (2005) (“CrR 7.6(b) provides for counsel at probation revocation hearings”).

A defendant has a right to counsel unless the defendant affirmatively waives that right. Under the court rule, a defendant has a procedural right to counsel at a probation hearing. State v. Conlin, 49 Wn. App. 593, 595 (1987). A waiver of that right must be knowing and voluntary. Id. Such a requirement is different from one that a waiver be knowing, intelligent and voluntary. A waiver is knowing and voluntary if a defendant knows of the right to counsel and the possible maximum consequence of a probation revocation hearing and nonetheless actively refuses counsel. Id. at 596. The Court of Appeals has recommended that prior to a probation revocation hearing a court conduct “a brief colloquy on the record advising a defendant of his or her rights, the risks of self-representation, and the possible penalty involved.” Id.

Standard Of Proof

Before a court may revoke a defendant’s probation, it must have “evidence sufficient to reasonably satisfy the court that the defendant violated a condition of probation.” Aberdeen v. Regan, 147 Wash.App. 538, 543 (2008).

Timing

Even after a term of probation expires, a sentencing court may punish a defendant for a violation of probation that occurred during the term of probation unless that court has already entered an order terminating probation: “[U]nder present RCW 9.95.230 the trial court’s jurisdiction to modify probation continues until the entry of an order terminating it.” State v. Alberts, 51 Wash. App. 450, 454, 754 P.2d 128, 130-31 (1988). However, a court cannot punish a defendant for a violation that occurred after the probationary period is over:

We conclude that although the court’s jurisdiction to entertain petitions to modify or revoke probation continues until such time as an order terminating probation is entered, the modification or revocation of probation can be based only on proscribed conduct that occurs during the probationary period.

State v. Holmberg, 53 Wash. App. 609, 610, 768 P.2d 1025, 1026 (1989).

Warrants And Arrests

“A finding of probable cause for a probation violation is not required before issuing a warrant for failure to appear.” *State v. Erickson*, 143 Wn. App. 660, 663 (2008).

The court must hold a hearing to set bail or release the defendant within 48 hours after a defendant is arrested for an alleged probation violation. Under CrR 7.6, CrR 3.2 applies to defendants picked up on probation violations:

The court shall not revoke probation except after a hearing in which the defendant shall be present and apprised of the grounds on which such action is proposed. The defendant is entitled to be represented by counsel and **may be released pursuant to CrR 3.2 pending such hearing.** . . .
CrR 7.6(b).

CrR 3.2(a) explains there is a presumption of release in non capital cases and directs the reader to CrR 3.2.1. Under CrR 3.2.1(a) a defendant is entitled to a probable cause hearing "no later than 48 hours following the person's arrest." Under CrR 3.2.1(c) "Saturday, Sunday and holidays may be considered judicial days."

Misc.

“The imposition of probation is not authorized when the maximum jail sentence is imposed on an offender.” *State v. Gailus*, 136 Wn. App. 191, 201 (2006).

A defendant is entitled to credit for time served against a suspended sentence for the time the defendant spends in jail on a probation violation or awaiting the hearing where the court sets bail or releases the defendant. *In re Schillereff*, 259 Wn.2d 649 (2007).

A court may not order a probationer to submit to a search not based on reasonable suspicion. *State v. Massey*, 81 Wn.App. 198 (1996).

Related Practice Advisory

See also practice advisory titled “Challenging Dirty UAs at Probation Revocation Hearings” for information on UAs and on limiting hearsay at probation revocation hearings.