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FSM v. Edward
20 FSM R. 335 (Pon. 2016)

FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA,

Plaintiff,

vs.

MARSON EDWARD,

Defendant.

CRIMINAL CASE NO. 2011-500

ORDER DISMISSING REVOCATION MATTER

Dennis K. Yamase
Chief Justice

Hearing: January 6, 2016
Decided: March 17, 2016

APPEARANCES:

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HEADNOTES

Criminal Law and Procedure – Sentence – Probation

Once a probationary period has elapsed the defendant has automatically satisfied the sentence imposed. FSM v. Edward, 20 FSM R. 335, 338 (Pon. 2016).

Criminal Law and Procedure – Sentence – Probation – Revocation

Extended jurisdiction over a defendant is proper if the revocation process has been set in motion during the probationary period. Courts have uniformly held that jurisdiction continues after the probation term so long as formal revocation proceedings were commenced within the probation term. FSM v. Edward, 20 FSM R. 335, 338 (Pon. 2016).

Criminal Law and Procedure – Sentence – Probation – Revocation

Jurisdiction over a defendant can be extended for a violation committed during the probationary

period, but only through the issuance of a summons, arrest warrant, or comparable court order notifying defendant of the allegations or issued before the expiration of the probationary term. FSM v. Edward, 20 FSM R. 335, 339 (Pon. 2016).

Criminal Law and Procedure – Sentence – Probation – Revocation

Due process requires that the sentencing court, not the probationary officer, ultimately determine whether revocation proceedings will be initiated. The sentencing court may initiate such proceedings sua sponte based on information acquired from any source, including the probation officer who is primarily responsible for acquiring and presenting such information to the sentencing court. Since Criminal Rule 32.1 does not specify who may file a report of violation, any person may supply the court with that evidence. FSM v. Edward, 20 FSM R. 335, 339 (Pon. 2016).

Constitutional Law – Due Process; Criminal Law and Procedure – Sentence – Probation – Revocation

Due process requires that for a warrant to issue, the report must demonstrate "probable cause" and this determination must be made by a judicial officer before jurisdiction is extended. Thus, the sentencing court takes primary responsibility for initiating probation revocation proceedings. To delegate that authority would be tantamount to abdicating the judiciary's sentencing responsibility to the executive. Ultimately, the court retains the discretion to reject or accept the probation officer's recommendations. FSM v. Edward, 20 FSM R. 335, 339 (Pon. 2016).

Criminal Law and Procedure – Sentence – Probation – Revocation

A petition for revocation, an affidavit of violation, or a notice of non-compliance, however styled, is merely a report or a motion, but does not by itself initiate revocation proceedings. FSM v. Edward, 20 FSM R. 335, 339 (Pon. 2016).

Criminal Law and Procedure – Sentence – Probation – Revocation

Only the court can initiate revocation proceedings and its usual practice is to issue an order notifying the defendant of the allegations and setting a hearing. This action may be made by issuing an arrest warrant, a summons, an order, or even a margin order, but in any case the procedure requires a judicial determination of probable cause to be made before the revocation proceedings are initiated. FSM v. Edward, 20 FSM R. 335, 339 (Pon. 2016).

Criminal Law and Procedure – Sentence – Probation – Revocation

If the court had formally initiated the revocation procedure before the expiration of the probationary term, jurisdiction would have been extended over the defendant and a revocation hearing held, but since the court did not do so before the defendant's probation ended on March 31, 2015, the court's jurisdiction over the defendant ended then. FSM v. Edward, 20 FSM R. 335, 339 (Pon. 2016).

Constitutional Law – Due Process; Criminal Law and Procedure – Sentence – Probation – Revocation

Regardless of the lesser standards that apply in revocation proceedings, due process is required. FSM v. Edward, 20 FSM R. 335, 340 (Pon. 2016).

Criminal Law and Procedure – Sentence – Probation – Revocation

A defendant is entitled to a judicial determination of probable cause and to notice of those proceedings before the court can hold a delayed revocation hearing. This rule is jurisdictional. Ordinarily, when the warrant, summons, or order is executed, filed, and served, the defendant is provided with notice of this process, and the affidavit of violation is attached or adequately summarized therein, thereby fulfilling FSM Criminal Rule 32.1's procedural requirements. The court must set this process in motion before the probationary sentence's expiration. FSM v. Edward, 20 FSM R. 335, 340 (Pon. 2016).

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COURT'S OPINION

DENNIS K. YAMASE, Chief Justice:

On January 6, 2016, this court held a revocation hearing and ordered the parties to brief the issue of whether jurisdiction is proper over a defendant after the probationary period has expired for violations that occurred during the probationary period. The statute governing probation in the FSM does not address this issue and this is a case of first impression for the court.¹ Upon consideration of the arguments presented at the hearing, the submission of the parties, and of the file and record contained herein, the court finds jurisdiction lacking under these particular circumstances, based on the following conclusions of both fact and law.

I. FACTS

On March 13, 2013, the defendant was convicted upon his plea of guilty to theft of mail matter in violation of 39 F.S.M.C. 221. The defendant was sentenced to two (2) years imprisonment, with the first three (3) months served in prison. The remainder of his term was to be suspended, during which time he was released on probation. On April 1, 2013, the defendant's sentence began, and on March 31, 2015, it was expected that his probationary sentence would end, if he complied with all of the conditions of his probation. Unfortunately, the defendant violated his probation several times during this period. First, on November 23, 2013, the defendant was arrested for the theft and burglary of Herbert Gallen.² On January 30, 2014, the court held a revocation hearing based on this alleged violation and returned the defendant to jail for fifteen (15) days. Second, on April 25, 2014, the State Justice Ombudsman (SJO) filed an affidavit of violation against the defendant alleging a failure to pay restitution as required.³ The court took no action on that report. Third, on May 8, 2014, the defendant was charged with another theft and burglary this time of Club Cupid's.⁴ The SJO filed another affidavit of violation on November 23, 2014, based on those charges, as well as the continuing failure to pay restitution, but again, the court took no action on the report. It was not until January 6, 2016, over a year and a half later, that the court finally summoned the defendant to appear for a second revocation hearing to address these violations. This revocation hearing was ordered approximately nine (9) months after the defendant's probationary sentence had run.

¹ Probation is governed by 11 F.S.M.C. 1202(5) and FSM Criminal Rule 32.1.

² The charges in criminal case PKD No. 12-14 were formally brought before the Pohnpei Supreme Court on March 12, 2014, and dismissed on June 3, 2014.

³ By the sentencing order of March 12, 2013, the defendant was required to pay \$345.00 restitution. At the revocation hearing the defendant was found to have failed to pay \$50.00 per month as ordered. In the Order of Partial Revocation of Probation dated January 31, 2014, the restitution payments were decreased to \$25.00 per month, until the remainder of the \$95.00 balance was paid in full. No further payments were ever made.

⁴ The charges in criminal case PKD No. 46-14 were formally brought before the Pohnpei Supreme Court on May 8, 2014, and the defendant was convicted of those charges on September 25, 2014.

II. DELAYED REVOCATION

"It is well settled that once a probationary period has elapsed the defendant has automatically satisfied the sentence imposed." State v. Weysham, 408 So. 2d 1104, 1105 (La. 1982). As a corollary to this rule, it is also well settled that extended jurisdiction over a defendant is proper if "the revocation process has been set in motion during the probationary period." 3 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE §25.4, at 157 (1984); see United States v. Barzanno, 712 F.2d 826, 835 (3d Cir. 1983) (noting that "all the cases support this view").⁵ Even in the absence of an explicit grant of jurisdiction by statute, the courts have "uniformly held that jurisdiction continued after the probation term so long as formal revocation proceedings were commenced within the term of probation." United States v. Barton, 26 F.3d 490, 492 (4th Cir. 1994).⁶

For some time, however, there was a split of authority in the U.S. courts as to what constituted "the precise triggering event" for initiating the revocation proceedings. United States v. Merlino, 785 F.3d 79, 83 (3rd Cir. 2015). Some courts held it was "the Government's filing of the revocation petition." *Id.*; see Barton, 26 F.3d at 491 ("courts retain jurisdiction to hold hearings related to revocation of supervised release for a reasonable period after the term of release expires when a petition charging a violation of the conditions of supervised release is filed during the period of supervised release"); United States v. Schimmel, 950 F.2d 432, 436 (7th Cir. 1991) ("it does not subtextually require that the district court *must* issue a warrant to obtain jurisdiction").

Other courts held that "formal revocation proceedings [be] commenced by arrest warrant or otherwise." Merlino, 785 F.3d at 82-83; see Sanford v. King, 136 F.2d 106, 107 (5th Cir. 1943) ("only upon a warrant issued by order of the Court"); see also United States v. Strada, 503 F.2d 1081, 1083-84 (8th Cir. 1974) ("a revocation can occur after the probationary period only if the violation is one that occurred during that period and if formal revocation procedures- usually the issuance of an arrest warrant- are initiated during that period").

This split of authority was finally resolved in favor of the later position by the 1994 amendment to the Probation Offenders Act which codified this body of common law. See 18 U.S.C. § 3565(c).⁷ "[T]he most likely purpose of the amendment was to make absolutely clear Congress' earlier intention that sentencing courts have the authority to hold hearings to revoke or extend supervised release after expiration of the original term if they issue a summons or warrant during the release period." United States v. Morales, 45 F.3d 693, 701 (2d Cir. 1995).

⁵ The government relies on a similar Missouri State law, Mo. Rev. S. § 549.071, which states: "The court granting probation or parole may at any time before order of discharge without notice to the defendant order his apprehension by the issuance of a warrant for his arrest." In *State ex. rel. Carlton v. Haynes*, the Missouri Supreme Court interpreted that statute and held that "a revocation can occur after the probationary period only if the violation is one that occurred during the period and if formal revocation procedures - usually the issuance of an arrest warrant - are initiated during that period." 552 S.W.2d 710, 714 (Mo. 1977).

⁶ The 1984 amendment to 18 U.S.C. § 3565(c), the Probation Offenders Act, merely "codified the well-settled principle that the jurisdiction of the court to revoke probation extends beyond the term of probation." United States v. Neville, 985 F.2d 992, 998 (9th Cir. 1992).

⁷ "The power of the court to revoke a sentence of probation for violation of a condition of probation, and to impose another sentence, extends beyond the expiration of the term of probation for any period reasonably necessary for the adjudication of matters arising before its expiration if, prior to its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation." 18 U.S.C. § 3565(c).

Even though the comparable FSM probationary statute lacks an explicit instruction regarding delayed revocation hearings, this court holds that jurisdiction over the defendant can nevertheless be extended for a violation committed during the probationary period, but only through the issuance of a summons, arrest warrant, or comparable court order notifying defendant of the allegations or issued prior to the expiration of the probationary term. This is in accord with the current trend in the law and is persuasively supported by the following due process argument.

Due process requires that "[t]he sentencing court, not the probationary officer, ultimately determines whether revocation proceedings will be initiated." United States v. Davis, 151 F.3d 1304, 1307 (10th Cir. 1998). "The sentencing court may initiate such proceedings *sua sponte* based on information acquired from any source, including the probation officer who . . . is primarily responsible for acquiring and presenting such information to the sentencing court." *Id.*; see United States v. Mejia-Sanchez, 172 F.3d 1172, 1174 (9th Cir. 1999) ("we conclude that a probation officer does not exceed her statutory authority when she submits a petition"); United States v. Cofield, 233 F.3d 405, 409 (6th Cir. 2000) ("we adopt the same rule"). FSM Criminal Rule 32.1 does not specify who may file a report of violation, as a result, any person may supply the court with that evidence. See United States v. Feinberg, 631 F.2d 388, 390 (5th Cir. 1980) ("no requirement that the proceedings be initiated by a particular officer of the government, or by any officer"). Due process nevertheless requires that for a warrant to issue the report demonstrate "probable cause" and this determination must be made by a judicial officer before jurisdiction is extended. See United States v. Ortiz-Hernandez, 427 F.3d 567, 579 (9th Cir. 2005) (warrant to extend jurisdiction must be based on probable cause). Thus, it is the sentencing court that takes "primary responsibility for [initiating] such proceedings." United States v. Berger, 976 F. Supp. 947, 949 (N.D. Cal. 1997). To delegate that authority would be "tantamount to abdicating the Judiciary's sentencing responsibility to the Executive." *Id.* at 950. Ultimately, therefore the court retains the "discretion to reject or accept the probation officer's recommendations." Davis, 151 F.3d at 1308. In short, a petition for revocation, an affidavit of violation, or a notice of non-compliance, however styled, is merely a report or a motion, but does not by itself initiate the revocation proceedings.

The Government argued that even though the revocation hearing is being held after the defendant's probation has expired, jurisdiction was extended when the SJO filed the request for a revocation hearing.⁸ As explained *supra*, this is not so. Revocation proceedings are initiated only by the Court and our usual practice is to issue the order notifying the defendant of the allegations and setting the hearing. This action may be made by issuing an arrest warrant, a summons, an order, or even a margin order, but in any case the procedure requires a judicial determination of probable cause to be made before the revocation proceedings are initiated.⁹ Had the court formally initiated the revocation procedure, jurisdiction would have been extended over the defendant and a revocation hearing held. The court, however, did not do so prior to the expiration of the probationary term. As a result, the defendant's probation ended on March 31, 2015, and with it this court's jurisdiction over the defendant.

⁸ The government relies on *State ex. rel. Carlton v. Haynes*, which states "a revocation can occur after the probationary period only if the violation is one that occurred during the period and if formal revocation procedures – usually the issuance of an arrest warrant – are initiated during that period." 552 S.W.2d 710, 710 (Mo. 1977) (emphasis added).

⁹ See Berger, 976 F. Supp. at 950 ("The Form 12 Procedure").

III. CONCLUSION

Regardless of the lesser standards that apply in revocation proceedings, due process is required. The defendant is entitled to a judicial determination of probable cause and to notice of those proceedings before the court can hold a delayed revocation hearing. This rule is jurisdictional. Ordinarily, when the warrant, summons, or order is executed, filed, and served, the defendant is provided with notice of this process, and the affidavit of violation is attached or adequately summarized therein, thereby fulfilling the procedural requirements of FSM Criminal Rule 32.1. This process, however, must be set in motion by the court, prior to the expiration of the probationary sentence.

UPON CONSIDERATION of the submissions and arguments of both parties, and the file and record contained herein, the court HEREBY DISMISSES the revocation matter for lack of jurisdiction over the defendant, Marson Edward.

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FSM SUPREME COURT APPELLATE DIVISION

BENJAMIN M. ABRAMS,)	APPEAL CASE NO. P10-2014
)	
Appellant,)	
)	
vs.)	
)	
FSM DEVELOPMENT BANK,)	
)	
Appellee.)	
_____)	

ORDER DISMISSING APPEAL

Dennis K. Yamase
Chief Justice

Decided: March 23, 2016

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