REL: July 9, 2021

Alabama Court of Criminal Appeals

OCTOBER TERM, 2020-2021

CR-19-0976

S.K.G.

v.

State of Alabama

Appeal from Mobile Circuit Court
(CC-16-6257.71)

McCOOL, Judge.

S.K.G. appeals the Mobile Circuit Court's order revoking her probation. For the reasons set forth herein, we affirm.

Facts and Procedural History

As best we can determine from the record on appeal, it appears that in 2017 S.K.G. was adjudicated a youthful offender on a charge of first-degree robbery, see § 13A-8-41, Ala. Code 1975, and was sentenced to three years in the custody of the Alabama Department of Corrections. See § 15-19-6(a)(4), Ala. Code 1975. The circuit court suspended S.K.G.'s sentence and ordered her to serve three years of probation. See § 15-19-6(a)(1), Ala. Code 1975.

In 2019, S.K.G.'s probation officer filed a delinquency report alleging that S.K.G. had violated the conditions of her probation by committing several technical violations and multiple criminal offenses. The circuit court subsequently held a revocation hearing at which the State presented testimony regarding S.K.G.'s alleged criminal offenses and at which S.K.G. admitted committing various technical violations of the conditions of her probation. On July 15, 2020, the circuit court issued a written order in which the court revoked S.K.G.'s probation and ordered her to serve the balance of her sentence for her first-degree-robbery adjudication. S.K.G. filed a timely notice of appeal.

Discussion

I.

On appeal, S.K.G. argues that the circuit court erred by not affording her an opportunity to allocute before revoking her probation. Although S.K.G. did not ask the circuit court for an opportunity to allocute or otherwise raise this claim in the circuit court, in other contexts "this Court has held that such [a claim is] an exception to the general rules of preservation." R.V.D. v. State, 268 So. 3d 96, 101 (Ala. Crim. App. 2018). Thus, we will address S.K.G.'s claim.

Whether a probationer has a right to allocution in a revocation hearing is a question of first impression in Alabama. We answer that question today by holding that Alabama law does not provide a probationer with that right. Accordingly, a circuit court does not err in a revocation hearing by failing to ask the probationer if he or she would like to make a statement before the court proceeds to revoke his or her probation.

We begin by noting that, although a probationer is entitled to certain "minimum requirements of due process" in a revocation hearing,

Armstrong v. State, 294 Ala. 100, 102, 312 So. 2d 620, 622 (1975), neither the United States Supreme Court nor Alabama's appellate courts have included the right to allocution among those requirements.[1] That is to say, there is no federal or state constitutional right to allocution. See Hill v. United States, 368 U.S. 424, 428 (1962) ("The failure of a trial court to ask a defendant ... whether he has anything to say before sentence is imposed is ... an error which is neither jurisdictional nor constitutional."). Thus, if there is a right to allocution in a revocation hearing in Alabama, that right must arise from a statute or procedural rule. However, a probationer is not provided with a right to allocution in a revocation hearing in either § 15-22-50 et seq., Ala. Code 1975, or Rule 27, Ala. R.

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[1]One of the due-process requirements that must be afforded a probationer in a revocation hearing is " 'the opportunity to be heard in person and to present witnesses and documentary evidence.' " Andrews v. State, 975 So. 2d 392, 394 (Ala. Crim. App. 2007) (quoting Morrissey v. Brewer, 408 U.S. 471, 489 (1972)). Although that requirement provides an "opportunity to be heard," that statement is clearly understood to refer not to allocution but to the minimal requirements that a revocation hearing occur and that the probationer be allowed to attend the hearing. See Pryor v. State, 589 So. 2d 816, 817 (Ala. Crim. App. 1991) (citing the requirement of an "opportunity to be heard in person and to present witnesses and documentary evidence" in noting the potential error in the probationer's absence from the revocation hearing).

Crim. P. -- the statutes and procedural rule that govern probation in Alabama. Nevertheless, S.K.G. contends that a probationer's right to allocution in a revocation hearing is found in Rule 26.9(b)(1), Ala. R. Crim. P., which provides that, "[i]n pronouncing sentence, the court shall ... [a]fford the defendant an opportunity to make a statement in his or her own behalf before imposing sentence." We disagree.

"The Alabama Rules of Criminal Procedure were promulgated by the Alabama Supreme Court pursuant to its rulemaking power. In construing these rules, this [C]ourt will attempt to ascertain and to effectuate the intent of the Alabama Supreme Court as set out in the rule." Dutell v. State, 596 So. 2d 624, 625 (Ala. Crim. App. 1991). " 'As an intermediate appellate court, this Court may interpret and apply the existing rules of procedure, but it may not rewrite them.' " W.B.S. v. State, 192 So. 3d 417, 420 (Ala. Crim. App. 2015) (quoting Ankrom v. State, 152 So. 3d 373, 392 (Ala. Crim. App. 2011) (Welch, J., dissenting)).

The Alabama Supreme Court has promulgated separate rules to govern the procedure for sentencing a defendant following a conviction -- Rule 26, Ala. R. Crim. P. -- and to govern the procedures for granting and

revoking probation -- Rule 27, Ala. R. Crim. P. As noted, Rule 26.9(b)(1) expressly provides a defendant with a right to allocution at the time sentence is pronounced, but Rule 27 contains no such provision. Given that the Court found it necessary to include a provision in Rule 26 that provides a right to allocution at the time sentence is pronounced, it stands to reason that the Court would have also ensured that Rule 27 contained a similar provision if the Court intended to provide that same right in a revocation hearing. That is to say, the Court has clearly recognized the importance of expressly providing a right to allocution where that right exists; thus, Rule 27's silence regarding allocution is telling. See Forbes v. State, 220 P.3d 510, 518 (Wyo. 2009) (noting that Rule 32 of the Wyoming Rules of Criminal Procedure, which governs the pronouncement of sentence, provides a right to allocution and that Rule 39 of the Wyoming Rules of Criminal Procedure, which governs the revocation of probation, did not provide such a right and holding that Rule 39's "silence on the issue" indicated that there was no right to allocution in a probation-revocation hearing); and State v. Caruthers, 22 Kan. App. 910, 911, 924 P.2d 1278, 1280 (1996) (holding that Kansas's sentencing statute,

which "specifically requires allocution prior to sentencing, ... ha[s] no relevance to proceedings under [the probation-revocation statute], which contains no such requirement").[2]

We acknowledge the possibility that the omission of a right to allocution in Rule 27 could have been merely an oversight. See United States v. Frazier, 283 F.3d 1242, 1245 (11th Cir. 2002) (acknowledging that the omission of a right to allocution in Rule 32.1, Fed. R. Crim. P., which governs the revocation of probation in federal courts, "could be the result of a simple oversight").[3] However, if that omission was indeed an oversight -- and we do not suggest that it was -- that is a correction to be made by the Alabama Supreme Court, not this Court. Indeed, for this Court to hold that Rule 26.9(b)(1) applies in a revocation hearing would

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[2]In Forbes, the Wyoming Supreme Court "urge[d] the Advisory Committee for the Wyoming Rules of Criminal Procedure to address this issue," Forbes, 220 P.3d at 518, and the Wyoming Rules of Criminal Procedure were subsequently amended to provide a probationer with a right to allocution in a revocation hearing. See Rule 39(a)(5)(A), Wyo. R. Crim. P.

[3]In 2005, the Federal Rules of Criminal Procedure were amended to provide a probationer with a right to allocution in a revocation hearing. See Rule 32.1(b)(2)(E), Fed. R. Crim. P.

effectively amount to a revision of the rules promulgated by the Alabama Supreme Court, which are not subject to revision by this Court. W.B.S., 192 So. 3d at 420.

The specific language of Rule 26.9(b)(1) provides another reason for concluding that the rule is not applicable in a revocation hearing. As noted, Rule 26.9(b)(1) states: "In pronouncing sentence, the court shall ... [a]fford the defendant an opportunity to make a statement in his or her own behalf before imposing sentence." (Emphasis added.) In revoking probation, however, a circuit court does not pronounce or impose sentence; rather, the court orders that a sentence that was previously imposed, but had been suspended, is to be executed. See Vicory v. State, 802 N.E.2d 426, 429 (Ind. 2004) (holding that, "at a probation revocation hearing, a sentence has already been imposed on a defendant but it has been suspended" and that, as a result, when the trial court revoked the appellant's probation, it "did not 'pronounce a sentence' " but, rather, "decided that the previously suspended sentence should be executed"); and Elhalaby v. United States, 999 A.2d 912, 915 (D.C. 2010) (noting that there is no right to allocution "where a previously imposed sentence takes

effect upon revocation of probation"). It is " 'the cardinal rule of statutory interpretation' " -- which we employ in interpreting the Alabama Rules of Criminal Procedure, Hamilton v. State, 496 So. 2d 100, 106 n.2 (Ala. Crim. App. 1986) -- that we seek " 'to determine and give effect to the intent of the [Alabama Supreme Court] as manifested in the language of the [rule].' " State v. Adams, 91 So. 3d 724, 735 (Ala. Crim. App. 2010) (quoting Ex parte State Dep't of Revenue, 683 So. 2d 980, 983 (Ala. 1996)). Thus, because a circuit court does not pronounce or impose sentence at a revocation hearing, the plain language of Rule 26.9(b)(1) indicates that the provisions of that rule does not apply in such a hearing.

Based on the foregoing, we hold that, under current Alabama law, a probationer does not have a right to allocution in a revocation hearing. Thus, a circuit court does not err in a revocation hearing by failing to ask the probationer if he or she would like to make a statement before the court proceeds to revoke probation. We recognize that several other states have reached a different conclusion, though some have put the burden on the probationer to request an opportunity to allocute, and some have limited the right to cases in which the sentencing determination had been

deferred until the revocation hearing. See, e.g., State v. Williams, [Ms. No. A-1-CA-37320, February 15, 2021] ___ P.3d ___ (N.M. Ct. App. 2021); State v. Mitchell, 195 Conn. App. 199, 224 A.3d 564 (2020) (citing State v. Strickland, 243 Conn. 339, 703 A.2d 109 (1997)); State v. Hand, 173 Wash. App. 903, 295 P.3d 828 (2013); Vicory, 802 N.E.2d at 429 (holding that "the right of allocution should apply to probation revocation hearings" but also holding that "the judge is not required to ask the defendant whether he wants to make a statement"; rather, "when the situation presents itself in which the defendant specifically requests the court to make a statement, ... the request should be granted"); and State v. Nez, 130 Idaho 950, 959, 950 P.2d 1289, 1298 (1997) (holding that allocution is not required in a revocation hearing if the trial court simply decides that "probation should be revoked and the original sentence executed" but that allocution "should be required if the trial court had not originally imposed sentence, but had withheld judgment until the probation revocation proceedings"). However, our interpretation of the Alabama Rules of Criminal Procedure leads us to the conclusion that a probationer currently has no right to allocution in a revocation hearing in Alabama, and, if such

a right is to be established, we leave it to the Alabama Supreme Court or the Alabama Legislature to take that step.[4]

II.

S.K.G. argues that the circuit court erred by failing to comply with Rule 27.6(c)(4), Ala. R. Crim. P., which requires a circuit court to ensure in a revocation hearing that the probationer understands that, "if the alleged violation involves a criminal offense for which the probationer has not yet been tried, ... any statement made by the probationer at the present proceeding may be used against the probationer at a subsequent proceeding or trial." However, S.K.G. did not raise this claim in the circuit court, and it is well established that

> "'[t]he general rules of preservation apply in probation-revocation proceedings. Puckett v. State, 680 So. 2d 980 (Ala. Crim. App. 1996). This Court has recognized three exceptions to the preservation requirement in probation-revocation proceedings: (1) that there be an adequate written or oral order of revocation, McCoo v. State, 921 So. 2d 450 (Ala. 2005); (2) that a revocation hearing actually be held; and (3) that the trial court advise the

[4]Of course, nothing prohibits a circuit court from affording a probationer an opportunity to allocute if he or she requests it, but S.K.G. did not request an opportunity to allocute in this case.

> defendant of his or her right to request an attorney. Croshon v. State, 966 So. 2d 293 (Ala. Crim. App. 2007). Our Supreme Court recognized a fourth exception to the preservation requirement that allows a defendant to raise for the first time on appeal the allegation that the circuit court erred in failing to appoint counsel to represent the defendant during probation-revocation proceedings. See Ex parte Dean, 57 So. 3d 169, 174 (Ala. 2010).' "

King v. State, 294 So. 3d 257, 259 (Ala. Crim. App. 2019) (quoting Singleton v. State, 114 So. 3d 868, 870 (Ala. Crim. App. 2012)).

As evidenced by King, the exceptions to the general rules of preservation do not include a circuit court's failure to comply with Rule 27.6(c)(4) by informing the probationer that any statement he or she makes in the revocation hearing may be used against him or her in subsequent proceedings. See also Smith v. State, 857 So. 2d 838, 840 (Ala. Crim. App. 2002) (holding that a claim that the circuit court failed to comply with Rule 27.6(c) "do[es] not fall within one of the exceptions to the general rules of preservation that have been recognized in probation revocation proceedings" and that, as a result, the appellant failed to preserve such a claim for appellate review by failing to raise the claim in the circuit court); McDaniel v. State, 773 So. 2d 1055, 1056 (Ala. Crim.

App. 2000) (same); Guilford v. State, 748 So. 2d 229, 230 (Ala. Crim. App. 1999) (same); Trice v. State, 707 So. 2d 294, 297 n.3 (Ala. Crim. App. 1997) (same); and Skipper v. State, 703 So. 2d 1013, 1014 (Ala. Crim. App. 1997) (same). Thus, because S.K.G. did not raise this claim in the circuit court, the claim is not properly before this Court and will not be addressed. Smith, supra.

Conclusion

Based on the foregoing, we affirm the circuit court's order revoking S.K.G.'s probation.

AFFIRMED.

Windom, P.J., and Cole and Minor, JJ., concur. Kellum, J., concurs in the result.