Third District Court of Appeal

State of Florida

Opinion filed October 28, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-1064
Lower Tribunal No. 15-19472A

Johny Etienne,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Richard L. Hersch, and Milton Hirsch, Judges.

Carlos J. Martinez, Public Defender, and James A. Odell, Assistant Public Defender, for appellant.

Ashley Moody, Attorney General, and Christina L. Dominguez, Assistant Attorney General, for appellee.

Before SCALES, HENDON, and MILLER, JJ.

HENDON, J.

Johny Etienne ("Etienne") appeals from a final order of revocation of probation and imposition of sentence. We affirm.

Facts

In 2016, Etienne pleaded guilty to two counts of armed robbery with a firearm. The trial court inquired at that time whether Etienne, who is Haitian, spoke and understood English, and Etienne responded affirmatively when asked if he was comfortable in the English language. The case proceeded entirely in English. He was sentenced as a youthful offender to boot camp, and two years of community control followed by three years of probation.

In 2019, the State filed an affidavit of violation of probation, alleging that Etienne violated his community control conditions by 1) possessing a firearm and by traveling to a gun range without permission; 2) failing to report to his community control officer; 3) failing to maintain his activity log; 4) leaving the county without permission; 5) changing his residence without notice or permission; 6) acquiring a new arrest for escape, obstruction, and disguise; and 7) failing to pay restitution.

Etienne's probation violation hearing took place over four days and was initially conducted in English, without an interpreter. The record shows Etienne asking and answering questions in English with no hesitation. On the third day of the hearing, Etienne's co-public defender spoke with Etienne and determined that although Etienne could speak and understand English, he might be more comfortable

with Creole. An interpreter was assigned during the remainder of the probation violation hearing. Etienne's counsel proceeded to question the witnesses, which included Etienne's probation officer. Defense counsel included questions about Etienne's lack of formal English language instruction. The State on re-direct pointed out that throughout Etienne's criminal proceedings he spoke English, did not demonstrate an inability to speak or understand English, and never requested a Creole interpreter. At the conclusion of the hearing, the court issued an order revoking Etienne's probation. In that order, the revocation court expressed displeasure with defense counsel's request for an interpreter on the third day of a four-day probation violation hearing. The revocation court expressed aggravation with defense counsel's claim that Etienne did not speak English and recited those portions of the record wherein Etienne showed his proficiency with English. Aside from these comments relating to Etienne's counsel, the order revoking probation detailed Etienne's clear violations of his community control requirements. The judge presiding at the revocation hearing also made clear that his issues with defense counsel did not taint his detailed determination that Etienne violated some of the terms of his probation.[1]

[1] The court found Etienne violated his conditions of probation by possessing a firearm; failing to report to his community control officer; leaving the county; obtaining a new arrest for escape; and failing to remain at his approved residence. The court found that Etienne did not violate the terms of his probation by failing to keep daily activity logs, where the defendant did make a nominal effort to do so;

The defense moved to disqualify the revocation judge based on the comments about defense counsel contained in the revocation order, asserting Etienne did not receive a fair hearing. The revocation judge granted the defense motion for disqualification, and a successor judge was assigned for the sentencing phase. At the sentencing phase, a new public defender argued that defense counsel did not explicitly assert that Etienne did not speak English, and that the trial court mistakenly believed that counsel had asserted a language barrier as a defense to Etienne's probation violations. The defense asked the court to hold a new factual evidentiary hearing. The State responded that, although defense counsel did not directly argue at the probation violation hearing that Etienne did not willingly violate his probation as a result of a language barrier, that theory was made clear through defense counsel's questioning of all the witnesses. The State argued that the revocation judge reasonably inferred the defense and plainly stated his legal conclusions.

The successor judge assigned to the sentencing phase found, on review of the record, that the revocation judge's factual findings were amply supported by the record and that it was clear that Etienne was in violation of his probation. The court

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giving a false name to the police during a traffic stop, as the false name statute is inapplicable; and failing to pay restitution, where there was no evidence presented of his ability to pay.

sentenced Etienne to six years as a youthful offender. On appeal, Etienne argues that his due process rights to a neutral hearing were violated, warranting a new evidentiary violation of probation hearing before a new judge. We disagree.

Standard of Review

Claims that the trial court "violated the defendant's due process rights" are reviewed de novo. Norvil v. State, 191 So. 3d 406, 408 (Fla. 2016). Generally, the appellate court applies an abuse of discretion standard when reviewing a trial court's decision to revoke probation. See Lawson v. State, 969 So. 2d 222, 229 (Fla. 2007).

Discussion

Judges presiding over probation revocation proceedings must remain mindful of the defendant's right to the "cold neutrality of an impartial judge" and the court's duty to "scrupulously guard this right." Crosby v. State, 97 So. 2d 181, 184 (Fla. 1957) (quoting State ex rel. Davis v. Parks, 141 Fla. 516, 194 So. 613, 615 (1939)). This is especially important in probation revocation proceedings, which, though adversarial in nature, are generally conducted with less formality and attention to the rules of evidence. "A trial court's prejudice against an attorney may be grounds for disqualification when such prejudice is of a degree that it adversely [a]ffects the litigant." Franco v. State, 777 So. 2d 1138, 1140 (Fla. 4th DCA 2001). The focus in a case such as this should be on the rights of the defendant. Id. (citing Robinson v. Tobin, 547 So. 2d 714 (Fla. 3d DCA 1989)).

On this record, however, Etienne does not provide any objective basis for his claim that the revocation judge was biased against him personally. The transcripts do not reveal any comments or rulings by the revocation judge throughout the four-day hearing that indicate any prejudice or bias against Etienne or, for that matter, any hostility towards his defense team during the hearings. The transcripts of the hearing show the trial court appropriately provided a neutral forum during the proceedings. Any prejudice alleged by Etienne was not directed towards him, and was not of such a degree that it adversely affected the outcome of his probation violation hearing. See Franco,777 So. 2d at 1140. Indeed, Etienne does not argue that the revocation court erred in its analysis of the evidence of Etienne's violations of probation, or that the court erred in its legal conclusions. Etienne does not argue that the evidence presented at the hearing was insufficient or incompetent to sustain the conclusion that Etienne violated certain terms of his probation.

On de novo review of the record, the revocation judge's rulings over the course of the probation violation hearing show no bias or hostility against Etienne.[2] The record shows that the issue of Etienne's English comprehension was but a small

[2] Etienne cites several federal cases in his initial brief in support of the notion that his counsel "failed to subject the prosecution's case to meaningful adversarial testing," and was thus denied his Sixth Amendment right to counsel. This confuses the issue on appeal, which is not whether defense counsel was actually ineffective, but whether the court was so biased against counsel as to render the defense ineffective.

part of the overall hearing. We conclude that the trial judge did not deprive Etienne of his right to the effective assistance of counsel, nor did the judge abuse his discretion by revoking Etienne's probation.

Affirmed.