IN THE COURT OF APPEALS OF IOWA

No. 2-990 / 11-1266
Filed January 9, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

NICOLE NERISSA WENTLAND,
Defendant-Appellant.

Appeal from the Iowa District Court for Dallas County, Virginia Cobb, District Associate Judge.

Nicole Wentland appeals from the sentence imposed upon her conviction for conspiracy to commit forgery, as well as a condition of probation. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Wayne Reisetter, County Attorney, and Jeannine Gilmore, Assistant County Attorney, for appellee.

Heard by Potterfield, P.J., and Danilson and Tabor, JJ.

POTTERFIELD, P.J.

Nicole Nerissa Wentland appeals from the sentence imposed upon her conviction for conspiracy to commit forgery. She contends the earlier deferred judgments she received upon her pleas of guilty to forgery and conspiracy to commit forgery should have merged. She also contends her constitutional right to free association was violated by an improper condition of probation, and her right to counsel was violated when the court did not appoint counsel to represent her at the hearing on her motion to modify the conditions of her probation.

I. Background Facts and Proceedings.

On February 25, 2009, the State charged Nicole Wentland with forgery to obtain a prescription controlled substance (a class "C" felony), and three misdemeanor theft offenses.[1] With respect to the charge of forgery to obtain a prescription controlled substance, the minutes of testimony indicate that on March 10, 2008, Wentland took a prescription pad from a doctor's office; she and another discussed using the prescription pad to obtain the controlled substance, Oxycodone; Wentland wrote out a prescription and the other person signed a doctor's name to the document; Wentland submitted the forged prescription to at least two separate pharmacies, one in Winterset, Iowa, and one in West Des Moines, Iowa; and Wentland obtained the controlled substance from the pharmacy in West Des Moines.

[1] The misdemeanor counts included allegations of thefts on March 10, 2008; September 5, 2008; and October 16, 2008. The minutes of testimony show allegations of a theft of a prescription pad from an Adel doctor on March 10; the theft of a cell phone from an Adel teacher on September 5; and the theft of liquor and cigarettes from an Adel employer on October 16.

On June 23, 2009, the State amended the trial information without resistance. Count 1A charged:

> Forgery, a Class D Felony, in violation of Iowa Code sections 715A.1 and 715A.2(1) [2011[2]]; The said Defendant on or about the 10th day of March, 2008 in West Des Moines, Dallas County, Iowa did, with the intent to defraud or injure someone, or with knowledge that person was facilitating a fraud or injury did make, complete, execute, authenticate, issue or transfer a writing so that it purports to be the act of another who did not authorize that act.

Count 1B charged:

> Conspiracy to commit Forgery, a Class D Felony, in violation of Iowa Code sections 706.1 and 706.3; The Defendant on or about the 10th day of March, 2008, in West Des Moines, Dallas County, Iowa, did with the intent to promote or facilitate the commission of a felony agree with another that they or one of them would engage in conduct constituting the crime.

Wentland pleaded guilty to counts 1A and 1B that same date pursuant to a plea agreement in which the misdemeanor theft charges would be dismissed. When asked to state in her own words what happened, Wentland reported that on March 10, in Dallas County:

> Okay, it was just a couple days before that I had had a doctor's appointment and I stole a prescription pad from my doctor. And I was using drugs at this time, which I'm eight months over now. I took the prescription pad and told one of my friends, which is not my friend that I had been getting pills from at that time, and we talked about it and said okay we are going to write out a prescription and go get it filled, so I wrote the prescription and signed it. I walked into Hy-Vee and I presented it to them, and it looked fine to them, and I got it partially filled, not completely filled, and paid in cash, no insurance, and walked out with the prescription.
>
> He was actually with me at the time and we talked about who was going to do it, and decided that it was going to be me, I guess, I was the dumber one.

[2] All references are to the 2011 Iowa Code because there have been no pertinent changes to the statutory provisions at issue.

Wentland requested that the court proceed to immediate sentencing. The court accepted the pleas and granted Wentland's request to defer judgment on both counts. The court asked if defense counsel had explained "[t]hese are the two [deferred judgments] you get for your lifetime." Wentland stated, "Yes, I understand that. I'll not need any more." The district court entered orders deferring judgments on Counts 1A and 1B and imposed two-year terms of probation.

Allegations of probation violations[3] were filed on October 25, 2010, and on November 18, the district court found Wentland in contempt and sentenced her to serve thirty days in jail.

Another report of a probation violation was filed on April 7, 2011, asserting that Wentland had failed to participate in substance abuse treatment as required. On June 23, a doctor's excuse was filed with the court stating, "Nicole was unable to attend court this AM and will be unable to attend 6-24-11 due to labor contractions."

On July 21, an addendum to the April report of a probation violation was filed indicating Wentland had been discharged unsatisfactorily from substance abuse treatment due to non-compliance. The probation officer wrote, "Although the defendant had told the treatment provider that she was excused due to pregnancy complications, the defendant never provided documentation, as

[3] The alleged probation violations included failing to maintain contact with her probation officer, failing to abstain from the use of illegal drugs, and failing to maintain employment. Wentland stipulated that she had violated the terms of her probation as set forth in the October 25, 2010 report.

requested, to the treatment provider." The probation officer recommended the revocation of the deferred judgments.

On August 5, 2011, a probation revocation hearing was held. The prosecutor stated at the beginning of the hearing that the parties engaged in "extensive conversation with the court in chambers." The prosecutor reported that following discussion, "the defendant would stipulate to the violations that have been reported with respect to her substance abuse treatment and lack of follow through." She continued:

> . . . It's my understanding that Ms. Wentland would be found in contempt for the Count 1A, the forgery, on which she received a deferred judgment. That she would serve 30 days in the county jail for the contempt of court; that her jail term would be served in three increments of ten days a piece, and that the file would be closed upon completion, that she would be on a payment plan with the county attorney's office for those obligations.
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> With respect to Count 1B as requested by the State, the court would be willing to consider revocation of the deferred judgment and impose a judgment at this time, that being to sentence the defendant to an indeterminate period of five years with the Department of Corrections; however, suspend that and continue the defendant on probation for a period of one year with the Department of Corrections.
>
> [The probation officer] offered suggestions to the court with respect to some downfalls with probation and some slipups that apparently she had witnessed with respect to Ms. Wentland, and felt that the influence of her significant other was an important issue that has caused Ms. Wentland to not successfully complete her probation. So with respect to this conviction now on Count 1B the parties understand the court is ordering now the fine of $750, plus surcharge and court costs. I would ask that any payments that have been made towards a civil penalty could now be applied to the fine.
>
> That she be ordered to follow through with recommendations of a substance abuse evaluation gotten recently by Ms. Wentland through A-1 Addictions; that she completely abstain from any consumption of alcoholic beverages; that also she sign releases; that also she sign releases of information of care providers to the probation officer for substance abuse and mental health treatment.

> Also we ask that the court order that she obtain a mental health evaluation and obtain those until maximum benefits are achieved.
>
> I understand that the court is also making a term of probation that the defendant shall not have contact with Michael Croft, and any child care arrangements shall be made by a third party. We all understand that Ms. Wetland's new born child is fathered by Mr. Croft, but she'll have to make other arrangements for those visitations.
>
> I think that covers what was discussed, Your Honor.

Defense counsel stated Wentland "was going to admit to violating the term of her probation" and that counsel would be requesting the court allow Wentland to "keep both deferred judgments." Defense counsel suggested that the court "impose a jail sentence, suspend some of that, allowing her to purge it if she gets back in treatment and successfully completes that treatment."

The court entered an order on Count 1A declining to revoke Wentland's probation, finding her in contempt, ordering that she serve thirty days in jail and thereafter be discharged from probation. The record contains no further orders on count 1A revoking the deferred judgment or entering a judgment of conviction. Wentland retained her deferred judgment on Count 1A.

As to Count 1B, the court entered an order revoking the deferred judgment and entered judgment and sentence for conspiracy to commit a felony (forgery). The court ordered Wentland to serve a term of five years, suspended the sentence, and placed the defendant on one year probation. The court addressed Wentland, stating in part:

> It is acknowledged, as indicated by [the prosecutor], that Michael Croft is the father of your baby, and the Court has serious concerns about your continued contact with him given the Court's knowledge of Mr. Croft and his legal issues. It is not the Court's intention to, nor do I believe I have any authority to, deprive him of visitation with his son. I believe that the county attorney referred to

> it as child care, and I already expressed to you off the record and will do so on the record my disapproval of any possibility that the child would be in Mr. Croft's care alone. But I do believe it is in your best interest for the time being that you not have contact with him, with Mr. Croft. And that any arrangements for visitation will be made through a third party.

As a condition of her probation on Count 1B, the court ordered "the Defendant shall not have contact with Michael Croft and any child care arrangements shall be made by a third party." Wentland filed an appeal from that ruling.

On September 1, 2011, Wentland, pro se, moved to modify the conditions of her probation. Specifically, she sought to have the court lift the restriction on her ability to have contact with the father of her child, asserting her "mental health has been poor due to the no contact with my significant other and father of my newborn child." She asserted, "We also have an ongoing court case together in which we need to communicate."

On September 22, 2011, the court ordered the dismissal of the request to amend conditions of probation as it "has no jurisdiction of this matter while the Defendant's appeal is pending."

A report of probation violation was filed on November 16, 2011. The probation officer asserted Wentland continued to have contact with the father of her child and recommended she be found in contempt, receive ninety days for contempt, and then be discharged from probation upon completion of contempt.

On the same date this probation violation report was filed, the court reconsidered its September 22 ruling, determined it did "have jurisdiction over collateral issues such as probation," and ordered that a hearing be held on

Wentland's request to modify the terms of her probation. That hearing was set for December 8, and the court "request[ed] that the Social Worker for [the Department of Human Services (DHS)] that is involved with the Defendant and Michael Croft will appear at said hearing or submit a report as to the Department's opinion on Defendant's request to have contact with Michael Croft."

On November 17, 2011, Wentland filed a waiver of counsel. However, on December 8, the day of the hearing, she filed an application for appointment of counsel. She also verbally requested counsel at the hearing on her motion to change the terms of her probation. The court stated, "I don't believe you're entitled to counsel for this particular hearing, I'm not saying you aren't—obviously for probation violation you are entitled to counsel, so I'll appoint counsel, but are you prepared to go forward today?" Wentland stated, "Yes." She then requested that she speak with her counsel. The court responded, "You don't get counsel for this part of the hearing."

The hearing proceeded. Wentland asked the court to be allowed contact with the father of her child. She reported she had "spoken with DHS and FSRP counselor once a week for the juvenile case," she was complying with drug testing, and "I'm asking basically for you to reunite our family."

The DHS case worker testified (pursuant to a court finding that the testimony was necessary to the proceeding) that "if the no contact order be modified there be limitations to it," noting family team meetings, juvenile court, Family Safety, Risk, and Prevention (FSRP) and therapy—essentially suggesting supervised contact only. The worker noted concerns about the paramour and "a recent drug screen."

The probation officer then made a statement to the court,

> I think there needs to be a separation so they can both work on themselves individually before they bring themselves together to work. It can potentially be a very toxic relationship, and now that there is another child on the way, I think that it is paramount that they get themselves in order first before they put all of that together.
>
> My recommendation would be the no contact order and—however, I do believe that if there are team meetings that that would be something that obviously they should be able to attend at the same time.

Wentland then stated the issues for no contact had been resolved, alluding to her paramour's involvement in a "committal case," and a child-in-need-of-assistance proceeding with his daughter, as well as a "juvenile case" with which they were both "compliant."

The district court observed,

> I can't ignore what I know about the dynamics that are present in this group; you are right about one thing, your probation is about you, but you don't get to control it. Okay?
>
> Your probation is about seeing that you achieve a level of not just compliance, but means a level of understanding and insight; that what I'm hearing from [the probation officer] and [the social worker], you have not yet achieved.

The court did, however, state it would modify the conditions of Wentland's probation to allow contact to attend FSRP meetings, family team meetings, and therapy when recommended by DHS. A written ruling was filed on December 8 in which the court found "therapeutic supervised contact may be beneficial" and modified the conditions of probation to allow contact with Croft under supervised conditions and at the discretion of DHS.[4]

[4] In January 2012, Wentland appeared with counsel for the probation revocation hearing, received a jail sentence of seventy-five days, and was discharged from probation upon completion of that sentence.

Wentland appealed from this order and her two appeals were consolidated. Wentland argues: (1) the district court imposed an illegal sentence in (a) failing to merge her deferred judgments for forgery and conspiracy to commit forgery, and (b) ordering an unreasonable condition of probation, violating her right to freedom of association under the state and federal constitutions; and (2) the district court improperly denied her right to counsel at the hearing on her motion to modify the conditions of probation.

II. Preservation of Error.

"[E]rrors in sentencing may be challenged on direct appeal even in the absence of an objection in the district court. Illegal sentences may be challenged at any time, notwithstanding that the illegality was not raised in the trial court or on appeal." *State v*. *Lathrop*, 781 N.W.2d 288, 293 (Iowa 2010).

III. Scope and Standards of Review.

We review a defendant's sentence for correction of errors at law. *State v*. *Valin*, 724 N.W.2d 440, 444 (Iowa 2006) (noting "any abuse of discretion necessarily results in a legal error").

We will interfere with the trial court's terms of probation only upon a finding of abuse of discretion. *See id.*

> The legislature has given the courts broad, but not unlimited, authority in establishing the conditions of probation." Iowa Code section 907.6 provides:
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> > Probationers are subject to the conditions established by the judicial district department of correctional services subject to the approval of the court, and *any additional reasonable conditions which the court* or district department *may impose to promote rehabilitation of the defendant or protection of the community*.

> Although the sentencing judge has discretion with respect to the conditions of probation, that discretion must be exercised "within legal parameters."

Lathrop, 781 N.W.2d at 293-94 (citations omitted). "The court abuses its discretion when its decision is based on untenable grounds or it has acted unreasonably." *State v*. *Millsap*, 704 N.W.2d 426, 432 (Iowa 2005).

We review a district court decision implicating a defendant's constitutional rights de novo. *State v*. *Lyman*, 776 N.W.2d 865, 873 (Iowa 2010).

IV. Discussion.

A. *Legality of sentence*. Iowa Code section 706.4 provides: "A conspiracy to commit a public offense is an offense separate and distinct from any public offense which might be committed pursuant to such conspiracy. A person may not be convicted and sentenced for both the conspiracy and for the public offense." Relying upon the second sentence, Wentland contends the court imposed an illegal sentence by "failing to merge sentences for forgery and conspiracy to commit forgery."

In *State v*. *Waterbury*, 307 N.W.2d 45, 52 (Iowa 1981), the court interpreted the last sentence of section 706.4 as "creating a merger of the conspiracy and the substantive offense where the defendant had been found guilty of both offenses." Here, Wentland has not been found guilty on both offenses. *See Daughenbaugh v*. *State*, 805 N.W.2d 591, 597 (Iowa 2011) (noting "an adjudication of guilt *does not occur when the defendant receives a deferred judgment*" (emphasis added)). The provision is inapplicable because,

on the forgery count, judgment has been deferred, no adjudication of guilt has occurred, and no sentence has been imposed.[5]

The State argues that the defendant should not be allowed to challenge merger at this point in the process. The State points out that Wentland willingly entered a plea agreement to her benefit and accepted the sanction for two class "D" felonies, which allowed her to avoid conviction for the class "C" felony originally charged, as well as the dismissal of three theft counts. The State contends this case is analogous to *State v*. *Walker*, 610 N.W.2d 524, 526 (Iowa 2000), where the court was "inclined to agree" that the defendant's appeal "seeks to transform what was a favorable plea bargain in the district court to an even better deal on appeal." In *Walker*, the defendant was convicted on his guilty plea to willful injury and voluntary manslaughter, and he was sentenced to two

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[5] Wentland argues that *State v. Tong*, 805 N.W.2d 599 (Iowa 2011), requires a different outcome. In *Tong*, 805 N.W.2d at 601-02, our supreme court explored two definitions of "convicted" that have been recognized in prior case law. "Historically, we have treated a deferred judgment as a 'conviction' when the purpose of the statute was to protect the community, but not when the statute's purpose was to increase punishment." *Tong*, 805 N.W.2d at 602. The *Tong* court concluded that for purposes of the felon-in-possession-of-firearms provision, Iowa Code section 724.26, a deferred judgment was a conviction "where the defendant had not successfully completed the term of his or her probation." *Id.* at 603. The court noted that the felon-in-possession provision

> applies both to persons who had been convicted of felonies and to persons who had been "adjudicated delinquent on the basis of conduct that would constitute a felony if committed by an adult." This tells us the legislature intended the statute to cover persons who had engaged in certain *conduct, i.e.,* acts that constitute felonies, and supports a broad interpretation of the term "convicted."

Id. at 602.

In *Daughenbaugh*, however, the court concluded "that a 'deferred judgment' is used in its strict legal sense in our postconviction relief statute, and as a result, a guilty plea pursuant to a deferred judgment is not a conviction under Iowa's postconviction relief statute." 805 N.W.2d at 598.

Iowa Code section 706.4 requires merger when a defendant has been "convicted *and* sentenced" on a conspiracy and a substantive count. Wentland was not convicted and sentenced on both counts, and the merger statute does not provide her relief.

consecutive ten-year terms of imprisonment. 610 N.W.2d at 525. On appeal, the defendant sought to reverse the judgment entered on his guilty plea to willful injury on the ground the conviction merged as a matter of law with his plea to voluntary manslaughter under Iowa Code section 701.9.[6] *Id.* The supreme court rejected the claim, stating:

> Given this record, we are persuaded the court committed no error when it granted Walker's invitation to sentence him on each charge. This is not a case, such as [*State v*. *Mapp*, 585 N.W.2d 746 (Iowa 1998)], where one assault with guns led to death of the victim and the required merger of the defendant-coconspirator's companion charge of conspiracy to commit willful injury. *Mapp*, 585 N.W.2d at 748-49. Nor is this a case in which plea negotiations led to a guilty plea which, while favorable to the defendant, so lacks a factual basis as to threaten the integrity of the plea process itself. *E*.*g*., *State v*. *Hack*, 545 N.W.2d 262, 263 (Iowa 1996).
>
> In another factual setting the crimes of willful injury and manslaughter may merge in accordance with Iowa Code section 701.9. But here the defendant knowingly pled to—and the record minimally supports a factual basis for—two separate crimes. Because the record establishes more than one assault, the court was authorized to impose more than one sentence.

Walker, 610 N.W.2d at 527. While not precisely on point, we agree that *Walker* provides guidance in the case before us. Because the trial information and Wentland's statements when she entered her guilty pleas establish a factual basis for both the defendant's agreement with another to forge a prescription to obtain a controlled substance, and the use of the forged prescription to obtain the controlled substance by use of a forged prescription, the court committed no error in accepting Wentland's guilty pleas.

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[6] Iowa Code section 701.9 provides:

> No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter judgment of guilty of the greater of the offenses only.

B. *Conditions of probation*. Wentland next contends the sentence imposed upon her conspiracy to commit forgery conviction included an unreasonable condition of probation. In *Lathrop*, 781 N.W.2d at 299, the court wrote:

> Pursuant to Iowa Code section 907.6, conditions of probation must not be unreasonable or arbitrary. A condition is reasonable when it relates to the defendant's circumstances in a reasonable manner and is justified by the defendant's circumstances. In assessing the court's exercise of discretion, we also keep in mind that probation is intended to promote the rehabilitation of the defendant and the protection of the community. A condition of probation promotes these dual goals when it addresses some problem or need *identified with the defendant*. Thus, the punishment should fit both the crime and the individual. The court is not permitted to arbitrarily establish a fixed policy to govern every case.

The State argues this issue is moot because Wentland has discharged her probation and the condition restricting her contact with the father of her child no longer applies to her as a result of the district court's sentencing order on Count 1B.

"Ordinarily, an appeal is deemed moot if the issue becomes nonexistent or academic and, consequently, no longer involves a justiciable controversy." *State v*. *Hernandez-Lopez*, 639 N.W.2d 226, 234 (Iowa 2002). We generally refrain from reviewing moot issues. *Id.*

> In determining whether we should review a moot action, we consider four factors. These factors include: (1) the private or public nature of the issue; (2) the desirability of an authoritative adjudication to guide public officials in their future conduct; (3) the likelihood of the recurrence of the issue; and (4) the likelihood the issue will recur yet evade appellate review. The last factor is perhaps the most important factor. If a matter will likely be moot before reaching an appellate court, the issue will never be addressed. Thus, the high likelihood of the issue recurring

> necessarily implies the desirability of an authoritative adjudication on the subject.

Id. (citations omitted).

Wentland responds that in challenging the constitutionality of a no-contact order imposed at sentencing and a probation condition that prevented her from having contact with the father of her child as a violation of her right to freedom to association, the issue should be reached. We are not convinced. The private and temporary nature of this idiosyncratic issue does not necessitate that we reach the merits. We agree with the State that this issue on appeal should be dismissed on mootness grounds.

C. *Right to counsel*. Relying upon the Sixth Amendment, Wentland argues that the hearing seeking modification of a no-contact condition imposed at sentencing was "clearly part of the sentencing proceedings and therefore a critical stage at which she was entitled to counsel." The State contends that probationers have only a qualified right to appointment of counsel at probation hearings, and because Wentland sought counsel at a hearing to change the conditions of probation, she had no right to counsel.

The Sixth Amendment to the federal constitution and article I, section 10 of the Iowa constitution afford an accused the right to the assistance of counsel. This guarantee has been held to attach at "every stage of the criminal proceeding where substantial rights of a criminal accused may be affected." *Mempha v*. *Rhay*, 389 U.S. 128, 134 (1967); *State v*. *Majeres*, 722 N.W.2d 179, 182 (Iowa 2006) (stating a defendant has a right to counsel "[a]t all critical stages of the criminal process"). The right to counsel extends to sentencing. *State v*. *Boggs*,

741 N.W.2d 492, 506 (Iowa 2007). However, Wentland has not set forth any authority for a Sixth Amendment right to counsel in a hearing on her motion to eliminate a condition of probation after her violation of the condition was set for hearing.

Wentland observes that an indigent facing jail time for contempt is also entitled to appointed counsel, citing *McNabb v. Osmundson*, 315 N.W.2d 9, 14 (Iowa 1982). We note, however, that the *McNabb* decision is based upon "the protections . . . found in the due process clause of the Fourteenth Amendment, although Sixth Amendment decisions of the Supreme Court may influence our determination." *See also Pfister v. Iowa Dist. Ct.*, 688 N.W.2d 790, 796 (Iowa 2004) (concluding the *due process* clause of the federal constitution requires that alleged parole violators be informed of their right to request counsel and "when the circumstances of a particular case meet the standard set forth in *Gagnon* [*v. Scarpelli*, 411 U.S. 778 (1973)], *due process* requires that counsel be appointed to represent indigent parolees" (emphasis added)). Due process protections extend the right to counsel to contempt proceedings and "any . . . hearing if it will result in the loss of [the defendant's] liberty." *McNabb*, 315 N.W.2d at 14. The hearing for which Wentland claims a right to counsel did not entail the potential for a loss of liberty. We agree with the district court that no constitutional right to counsel attached to the hearing at issue.

Under Iowa Rule of Criminal Procedure 2.28(1), an indigent person has the right to appointed counsel in probation revocation hearings.[7] It is not for this

[7] Rule 2.28(1) states:

court to extend that rule-based right to counsel, and the consequent costs, to a hearing not explicitly indicated.

V. Conclusion.

Iowa Code section 706.4 is inapplicable because, on the forgery count, judgment has been deferred, no adjudication of guilt has occurred, and no sentence has been imposed. Wentland's claim concerning an unreasonable condition of probation is moot. Finally, Wentland had no constitutional or statutory right to counsel at the hearing on her motion to modify the conditions of her probation. We therefore affirm.

AFFIRMED.

> Every defendant who is an indigent person as defined in Iowa Code section 815.9 is entitled to have counsel appointed to represent the defendant at every stage of the proceedings from the defendant's initial appearance before the magistrate or the court through appeal, including probation revocation hearings, unless the defendant waives such appointment.
>
> An alleged parole violator who is an indigent person as defined in Iowa Code section 815.9 shall be advised during his or her initial appearance of the right to request the appointment of counsel for the parole revocation proceedings.

Probation revocation is a civil proceeding and not a stage of criminal prosecution. *Gagnon*, 411 U.S. at 782. However, the *Gagnon* court noted that under certain circumstances, a probationer may have a due process right to counsel.

> Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present. In passing on a request for the appointment of counsel, the responsible agency also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself. In every case in which a request for counsel at a preliminary or final hearing is refused, the grounds for refusal should be stated succinctly in the record.

Gagnon, 411 U.S. 790-91.