STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0317

State of Minnesota,
Respondent,

vs.

Andre Lorenzo Watts,
Appellant.

Filed December 31, 2012
Affirmed
Peterson, Judge
Concurring specially
Cleary, Judge

Hennepin County District Court
File No. 27-CR-10-32680

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Elizabeth Amy Roosevelt Johnston, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Ngoc Lan Nguyen, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Bjorkman, Judge; and Cleary, Judge.

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

Appellant argues that the district court abused its discretion by revoking his probation without offering him limited use immunity so that he could testify about his pending criminal charge at his probation-revocation hearing. We affirm.

FACTS

On May 2, 2011, appellant Andre Watts pleaded guilty to fourth-degree criminal sexual conduct. The district court imposed a 59-month sentence, stayed execution for ten years, and placed appellant on probation. Conditions of appellant's probation included that he serve 365 days in the workhouse and that he remain law abiding. Appellant was ordered to report to the workhouse on June 9. On May 27, respondent state of Minnesota charged appellant with offering a forged check. Based on the new charge, the state filed an arrest and detention order alleging that appellant violated the terms of his probation by failing to remain law abiding.

At the probation-revocation hearing on November 14, the state moved to proceed with the probation revocation in lieu of a trial on the forged-check charge. Appellant objected to proceeding with the revocation hearing while the pending criminal matter was unresolved and requested a continuance. The court granted the state's motion. The state presented the testimony of two police officers, the owner of the checking account from which the check was issued, a bank teller, and appellant's probation agent. Appellant did not testify. The court found by clear and convincing evidence that appellant violated his

probation. The court revoked appellant's probation and executed his 59-month sentence, and the state dismissed the forged-check charge. This appeal follows.

D E C I S I O N

Appellant argues that the district court abused its discretion and "implicated" his constitutional right to due process by revoking his probation without offering him limited use immunity at his probation-revocation hearing to testify about his pending criminal charge. A district court's decision to revoke probation is reviewed under an abuse-of-discretion standard. *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980). But when an "appeal raises a legal issue, this court need not defer to the district court's decision." *State v. Phabsomphou*, 530 N.W.2d 876, 877 (Minn. App. 1995), *review denied* (Minn. June 29, 1995). "When constitutional issues involving due process are raised, this court reviews the [district] court's legal conclusions de novo." *State v. Heath*, 685 N.W.2d 48, 55 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004).

The rules of criminal procedure provide that if a probationer's "violation report alleges a new crime, the revocation hearing may be postponed pending disposition of the criminal case." Minn. R. Crim. P. 27.04, subd. 2(4)(c). The district court's decision to proceed with appellant's probation-revocation hearing while appellant's new criminal charge was pending was consistent with this rule. *See Phabsomphou*, 530 N.W.2d at 878 (choice of word "may," rather than "shall," in rule 27.04, subd. 2(4), indicates that drafters intended to leave district court with discretion to decide when revocation hearing would be held).

Appellant argues that in *Phabsomphou*, this court held that "a defendant should be offered limited use immunity for all statements made at a probation revocation hearing." We disagree. In *Phabsomphou*, this court held that the district court's decision to proceed with the probation-revocation hearing before the criminal trial resolved the criminal charges that formed the basis for the probation revocation was within the court's discretion, consistent with Minn. R. Crim. P. 27.04, subd. 2(4), and not a violation of due process. 530 N.W.2d at 878. Later, in *State v. Hamilton*, this court held that when "exercising its discretion to refuse to postpone the revocation hearing, the district court does not have an affirmative duty to offer the probationer limited-use immunity to testify concerning the new charges." 646 N.W.2d 915, 916 (Minn. App. 2002), *review denied* Minn. Sept. 25, 2002), *abrogated in part on other grounds*, *State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005).

Appellant attempts to distinguish *Hamilton* by arguing that because he objected to holding the probation-revocation hearing before the pending criminal charge was resolved, "the [district] court was obligated to offer" him limited use immunity. But in *Hamilton*, this court did not discuss or rely on the absence of an objection to proceeding with the probation matter before the criminal matter was resolved. *Id.* Instead, this court focused on the fact that "[t]he record does not reflect that Hamilton ever requested limited-use immunity." 646 N.W.2d at 919. As in *Hamilton*, appellant did not request limited use immunity.

Because the district court had no affirmative obligation to offer appellant limited use immunity to testify at his probation-revocation hearing and appellant did not request

limited use immunity, appellant was not denied due process of law, and the district court did not abuse its discretion in revoking appellant's probation.

Affirmed.

CLEARY, Judge (concurring specially)

I concur in the majority's decision to affirm the district court's revocation of appellant's probation, but I write separately to express my concern with the procedures in place for probation revocation hearings based solely on allegations of the commission of a new crime.

Appellant received a dispositional departure for his conviction of fourth-degree criminal sexual conduct when the court imposed a 59-month sentence but stayed the execution of that sentence for ten years. Among the conditions of probation was the condition that appellant remain law abiding. Appellant was permitted to remain out of custody for several weeks. The court warned appellant that, if he violated any probation conditions pending his incarceration, his sentence "could change dramatically." Appellant was charged with a new offense, offering a forged check, only 25 days after he had been sentenced for fourth-degree criminal sexual conduct. As in *State v. Hamilton*, 646 N.W.2d 915 (Minn. App. 2002), *abrogated in part on other grounds, State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005), the record here does not reflect that appellant ever requested limited-use immunity. *Hamilton* held that the district court is not obligated "to unilaterally offer a defendant limited-use immunity at the revocation hearing." *Id.* at 919. Thus, the court acted within its discretion when it chose to proceed with the revocation hearing without offering the appellant limited-use immunity. Appellant did not testify and his probation was revoked.

Rule 27.04, subdivision 2(4)(c), of the Minnesota Rules of Criminal Procedure provides "[i]f the violation report alleges a new crime, the revocation hearing *may* be

postponed pending disposition of the criminal case." (Emphasis added.) The permissive language in this subdivision has remained unchanged since it first appeared in the rules in 1984. Minn. R. Crim. P. 27.04, subd. 2(4) (1984). Although this court has noted that when the disputed violation is based solely on the alleged commission of a new crime, there are strong policy considerations in favor of delaying the revocation hearing until after disposition of the new criminal charge, failure to do so does not violate due process. *State v. Phabsomphou*, 530 N.W.2d 876, 878–79 (Minn. App. 1995), *review denied* (Minn. June 29, 1995).

In *Phabsomphou*, the court offered limited-use immunity to the appellant if he chose to testify at the revocation hearing. I believe that remains the best practice if the district court chooses to proceed while criminal charges are pending. While *Hamilton* suggests that the burden is on the defendant to request such immunity, there is a "gotcha" quality to such a rule, where a pro se or ill-advised defendant fails to make such a request due to ignorance.

Moreover, the district court, in the absence of limited-use immunity, should be required to postpone the revocation hearing pending disposition of the criminal charges. Among other things, holding a probation-revocation hearing before trial on the new charges ignores the fact that the defendant may ultimately be acquitted of the new charges and found not to be in violation of a probation condition that he remain law abiding or not commit any same or similar offenses. *See State v. Weisberg*, 473 N.W.2d 381, 383 (Minn. App. 1991) (reversing the revocation that was based on Weisberg's failure to "remain law-abiding and have no same or similar violations" because

Weisberg's acquittal precluded a finding of a similar violation (quotation marks omitted)), *review denied* (Minn. Oct. 11 1991).

The court in *Phabsomphou* noted that "If the Minnesota Supreme Court had not wanted to confer discretion upon the district court, it would have made postponement of the revocation hearing mandatory. The rule now includes the word 'may'; the decision to substitute 'shall' must be made in the proper forum." *Phabsomphou*, 530 N.W.2d at 879.

It is time to take another look at this language. I believe that there are legitimate constitutional concerns surrounding the holding of a revocation hearing in the absence of an offer of limited-use immunity for the defendant when the revocation is based on pending criminal charges. Consequently, the language of rule 27.04, subdivision 2(4)(c), should be amended to provide that, in the absence of an offer of limited-use immunity, the postponement of the revocation hearing "shall" be postponed pending disposition of the criminal case. Unfortunately, 17 years after *Phabsomphou*, the decision to substitute "shall" still has not been made "in the proper forum."