COURT OF APPEALS DECISION DATED AND FILED

November 28, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 01-1674-CR

Cir. Ct. No. 00-CM-2575

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANNY R. CALDWELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: T.J. GRITTON, Judge. *Affirmed*.

¶1 NETTESHEIM, P.J.[1] Danny R. Caldwell appeals from an amended judgment of conviction imposing an added period of confinement as a condition of

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

probation.[2] Caldwell contends that the trial court's modification of the judgment violated his due process rights as set out in ***State v. Hays***, 173 Wis. 2d 439, 496 N.W.2d 645 (Ct. App. 1992). We disagree. We affirm the amended judgment.

¶2 The facts are not disputed. On November 29, 2000, Caldwell was convicted of battery pursuant to WIS. STAT. § 940.19(1) based on his plea of no contest. The trial court withheld sentence and placed Caldwell on probation for two years. As conditions of probation, the trial court ordered Caldwell not to have contact with the victim and to serve forty-five days' confinement time in the county jail. At the conclusion of the proceeding, the court scheduled a probation review hearing for March 16, 2001.

¶3 On February 5, 2001, Caldwell had contact with the victim in violation of the no contact provision of the judgment. Caldwell's probation agent reported this incident to the trial court and advised that Caldwell had served ten days in the county jail on a probation hold as a result of the incident. The agent also reported that he was not seeking any modifications of the existing terms of probation.

¶4 Caldwell failed to appear at the March 16, 2001 probation review hearing so the trial court issued a warrant for his arrest. However, before the warrant was executed, Caldwell appeared before the court on March 20 and the court conducted the review proceeding on that date. Also present was Attorney David Keck who was representing Caldwell on a pending disorderly conduct charge that resulted from Caldwell's contact with the victim on February 5, 2001.[3]

[2] Caldwell also appeals from the order amending the judgment.

[3] It appears Attorney Keck was a public defender.

When the court asked Keck if he was representing Caldwell on this matter, Keck replied, "At this time our office would not be able to represent Mr. Caldwell. It would depend on what would happen at today's hearing."

¶5 The trial court then provided Caldwell the probation agent's report and gave him an opportunity to read it. The court next advised Caldwell that the purpose of the hearing was to review Caldwell's performance on probation. Caldwell responded that he had been abiding by the conditions of probation. The court expressed its disappointment about the February 5 incident and asked the State for its position. However, the State did not make a recommendation in light of the ten days that Caldwell had already served on the probation hold.

¶6 At this point in the proceeding, Caldwell asked for an attorney. In response, the trial court again called upon Keck who stated that if the State was going to seek further incarceration, he would represent Caldwell. The court then briefly adjourned the proceeding to allow Keck to speak with Caldwell. When the proceeding resumed, Keck advised that he was representing Caldwell. Keck then questioned whether the trial court could impose additional jail time as a condition of probation in the absence of a written petition by the State. The proceeding ended with the trial court making the following statement:

> Well, quite frankly, I wasn't going to impose any more jail time today because of the jail time he got. However, it is my opinion that [I do] have the right to modify a sentence or a condition of probation without it being requested by the State. I think that is my inherent authority and I am going to modify one section of this sentence. The probation, everything else, will remain the same. I am, however, imposing and staying additional 90 days.

The court then scheduled the matter for an additional future probation review.

¶7 Caldwell appeals. He claims that the procedure in this case violated certain of his due process rights as set out in ***Hays***. Under ***Hays***, a probationer's due process rights at a modification hearing are the following: (1) to be notified of the hearing and the reasons that are asserted in support of the request to modify the probation; (2) to be present at the hearing; (3) to be given the chance to cross-examine witnesses, present witnesses, present other evidence and the right of allocution; (4) to have the conditions of probation modified on the basis of true and correct information; and (5) to be represented by counsel if confinement to the county jail is a potential modification of the conditions of probation. ***Hays***, 173 Wis. 2d at 447.

¶8 Although setting out these rights, ***Hays*** also instructs that a probation modification hearing "need not be a formal, trial-type hearing," ***id***., and that "[a]dherence to the strict formalities of a code of procedure or the rules of evidence would only thwart the trial court in devising or modifying terms and conditions of probation individualized for the probationer," ***id***. at 448.

¶9 We are satisfied that the trial court protected all of Caldwell's due process rights set out in ***Hays***. As to notice, Caldwell knew at the conclusion of the plea and sentencing hearing that the trial court intended to review Caldwell's probation performance at the review proceeding. And since Caldwell was ordered to serve county jail confinement as a condition of his probation, we conclude that he is reasonably held to know that he was in peril of such further confinement at the review proceeding depending on his conduct in the interim. In addition, at the opening of the review proceeding, the trial court provided Caldwell with the agent's written report so Caldwell was put on notice as to the basis for any probation modification that the court might order. We also note that neither Caldwell nor Keck complained that the probation agent's report came as a

surprise. This is understandable since Caldwell already stood charged with disorderly conduct as a result of the incident referenced in the report and Keck was representing Caldwell on that charge. Instead, Keck's only complaint was that the State had not filed a formal written motion or petition asking for additional jail confinement as a condition of probation. Caldwell's right to notice was properly protected.

¶10 As to presence, Caldwell was obviously present at the review hearing, and he does not assert any violation of this right.

¶11 As to confrontation and the right to present witnesses, neither the State nor Caldwell chose to present evidence other than the probation agent's report. Moreover, neither party challenged this evidence. While this evidentiary process was informal, ***Hays*** recognizes and approves such procedure. ***Id***. at 447-48. As to allocution, Caldwell explained the circumstances surrounding the February 5 incident involving contact with the victim. In addition, he addressed his performance while on probation.

¶12 As to the truthfulness and accuracy of the information in the agent's report, Caldwell did not dispute the agent's report. Finally, as to the right to counsel, Caldwell was represented by Keck.[4]

¶13 In summary, we hold that all of Caldwell's due process rights under ***Hays*** were protected by the procedure in this case.

[4] Caldwell argues that Keck's representation was meaningless because neither he nor Keck had proper advance notice. Since we have held that Caldwell received adequate notice, we reject Caldwell's claim that his right to counsel was not adequately protected.

¶14 In addition to the foregoing requirements, ***Hays*** also requires that the probation modification be *for cause*. ***Id***. at 448. Caldwell argues that the trial court's modification order was not premised upon his February 5 contact with the victim, but rather was in response to Keck's challenge to the trial court's authority to order modification in the absence of a written motion or petition from the State. Caldwell bases this argument on the trial court's remarks that we have quoted above.

¶15 We disagree with Caldwell's reading of the trial court's remarks. True, Keck and the trial court disagreed about the court's authority to order a confinement modification in the absence of a motion from the State, and the court did assert its belief in its authority to impose such a modification in its concluding remarks. But we do not read those remarks to say that the court's purpose in making the modification was merely to demonstrate that the court could do what it believed it had the power to do.

¶16 We reach this conclusion by looking to the entire proceeding and placing the trial court's remarks in the proper context. The purpose of the proceeding was to evaluate Caldwell's performance on probation. The focus of the proceeding was the probation agent's report about the "no contact" event. The issue at the proceeding was the appropriate sanction, if any, for Caldwell's admitted violation of the "no contact" provision. In speaking to that sanction, the court said that it "wasn't going to impose any more jail time today" in light of the jail time already served by Caldwell under the probation hold. We take that to mean that the court had decided not to *immediately* require Caldwell to serve additional confinement time. Instead, the court imposed and *stayed* the additional confinement time and then scheduled the matter for another review.

¶17 We are not persuaded that the trial court's statement about its authority to impose a sanction signals that the court lost sight of the ultimate purpose of the hearing which was to determine whether Caldwell had violated the condition of probation and, if so, the appropriate sanction. Moreover, the court's statement about its authority was understandable and necessary since Keck had challenged that very authority.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.