IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOSEPH DORDELL,	)	
	)	C.A. No. 492, 2003
Defendant Below,	)	
Appellant,	)	Court Below: Superior Court
	)	of the State of Delaware in
v.	)	and for New Castle County
	)	
STATE OF DELAWARE,	)	Cr. ID. No. 0208012449
	)	
Plaintiff Below,	)	
Appellee.	)	

Submitted: March 9, 2004
Decided: April 1, 2004

Before **BERGER, STEELE** and **JACOBS**, Justices.

This 1st day of April 2004, upon consideration of the briefs of the parties, it appears to the Court as follows:

1. In this appeal, Joseph Dordell contends that his probation officer placed restrictions upon him as additional conditions of probation in violation of his liberty interest protected by due process as envisioned by the Fourteenth Amendment to the United States Constitution and Article 1, Section 7 of the Delaware Constitution. In essence, he contends that due process guaranteed him a pre-deprivation hearing before his probation officer could lawfully impose additional conditions of probation. While Dordell was on community supervision, his probation officer imposed restrictions on his freedom of association and offered him the option to accept or refuse the conditions. Dordell's refusal would have

generated a notice of violation and a hearing before the sentencing judge. Because Dordell did not wish his probation violated, he signed a form "accepting" the enhanced restrictions proposed by the probation officer. The alternative to Dordell's refusing to accept the new conditions was he could – as in fact he did – accept them and then file a Motion for Review of Conditions of Probation, thereby generating judicial review of the enhanced conditions. Because judicial review occurred promptly after Dordell's Motion for Review and because that judicial review provided adequate post-deprivation remedies that satisfied due process, we affirm.

2. The parties do not dispute the underlying facts or the proceedings that led to this appeal. On May 12, 2003, Dordell pleaded no contest to Unlawful Imprisonment Second Degree and Offensive Touching. The subject of the offenses was a five year old girl. The sentencing judge imposed one year Level V suspended for one year Level II probation on the charge of Unlawful Imprisonment Second and thirty days Level V suspended for Level I probation for one year on Offensive Touching, to be served consecutively. A special condition of the probation was no contact with the "victim." On June 24, 2003, based upon the Affidavit of Probable Cause for his arrest, Dordell's probation officer imposed "sex offender special conditions" which included no contact with anyone under the age of 18. While this "special condition" was only one of several, it did, as a

practical matter, prohibit Dordell from "participating in family vacations or family events as nieces and/or nephews might be present."[1] On July 8, 2003, Dordell filed a Motion to Review Conditions of Probation. On September 9, 2003, a Superior Court judge held a hearing and denied Dordell's motion. The judge did modify the special conditions, however, to allow Dordell to interact with minors in Dordell's immediate family under adult supervision by a person approved by Probation and Parole. The judge concluded that while 11 *Del.C.* § 4332 provides a mechanism for the Court to review conditions of probation, there is no standard of review prescribed by the statute. The court further noted that 11 *Del.C.* § 6502 grants Probation and Parole the authority to impose appropriate conditions, but likewise articulates no standard for doing so. The Superior Court judge reviewed the nature of the offenses and the information in the Affidavit of Probable Cause for his arrest that was relied upon by Dordell's probation officer, and concluded that:

(a) 11 *Del. C.* § 6502 confers broad authority on the Department of Corrections and Office of Probation and Parole to impose conditions in connection with the supervision of offenders released to the community; and,

(b) Despite the fact that Dordell had not been adjudicated guilty of sex offenses *per se,* whether the court reviewed the imposition of the special

[1] Tr.p. 5 –Appellant's Appendix (A-19).

conditions under an abuse of discretion standard or *de novo* with the burden of proof upon the State to establish the viability of the conditions by a preponderance of the evidence, both standards were satisfied by the Affidavit of Probable Cause attached to Dordell's arrest warrant. Although a professional had evaluated Dordell and found that he had a "preoccupation with children" *after* the imposition of the special conditions, the Superior Court judge nevertheless concluded that the probation officer acted within her broad authority and "to protect the safety of the community."

3. Dordell's sole argument on appeal is that before special conditions of probation can be imposed unilaterally by a probation officer, due process requires a hearing with constitutional safeguards if those conditions restrict a probationer's liberty even when the probationer is released to the community.

4. In *Gagnan v. Scarpelli*,[2] the United States Supreme Court addressed the standard for *revocation* of probation and due process that must be met under *Morrissey v. Brewer*[3] before a probationer or parolee may be removed from the community and incarcerated. While we face no such drastic consequence here, we note the practical considerations at play when balancing due process rights against the costs and efficiencies of an effective probation system. In *Gagnon*, the Court stated: "…due process is not so rigid as to require that the significant interests in

[2] 411 U.S. 778 (1973).
[3] 408 U.S. 471 (1972).

informality, flexibility, and economy must always be sacrificed."[4] Our Superior Court and the courts of other states have recognized that post-deprivation procedures made available by a state can remedy due process concerns.[5] Federal Courts of Appeal have also concluded that federal due process does not require that there be notice and a hearing before a term of probation can be extended or modified.[6]

5. Here, Dordell complains that his probation officer unilaterally forced him to accept special conditions of probation restricting his freedom in the

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[4] 411 U.S. at 788.

[5] "…[E]ither the necessity of quick action by the State or the impracticality of providing any meaningful pre-deprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process." *Hall v. McGuigan*, 743 A.2d 1197 (Del. Super. Ct. 1999) quoting *Parratt v. Taylor*, 451 U.S. 527, 539 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986); See also *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (upholding summary seizure and destruction of drugs without a pre-seizure hearing); *Fahey v. Mallonee*, 332 U.S. 245 (1947) (recognizing that the protection of the public interest against economic harm can justify the immediate seizures of property without a prior hearing when substantial questions are raised about the competence of a bank's management); *Bowles v. Willingham*, 321 U.S. 503 (1944) (upholding the authority of the Administrator of the Office of Price Administration to issue rent control orders without providing a hearing to landlords before the order or regulation fixing rents became effective); *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (upholding the right of a state to seize and destroy unwholesome food without a pre-seizure hearing - possibility of erroneous destruction of property was outweighed by the fact that the public health emergency justified immediate action).

[6] Several circuit courts have concluded that *Gagnon* does not apply in the context of a proceeding to extend probation because the liberty interest at stake in an extension proceeding is less significant than in a revocation proceeding, and, therefore, a pre-extension hearing is not a constitutionally mandated right. *See, e.g., Forgues v. United States,* 636 F.2d 1125, 1127 (6th Cir. 1980) (per curiam); *United States v. Cornwell*, 625 F.2d 686, 688 (5th Cir.), *cert. denied*, 449 U.S. 1066 (1980); *United States v. Carey*, 565 F.2d 545, 547 (8th Cir. 1977) (per curiam), *cert. denied*, 435 U.S. 953, (1978); *Skipworth v. United States*, 508 F.2d 598, 601 (3d Cir. 1975). In *Forgues*, *Cornwell*, and *Skipworth*, however, the courts, pursuant to their *supervisory* powers required notice and a hearing for all future extensions of probation.

community without notice or a hearing before a judicial officer. The record shows that Dordell could have rejected the request to sign an agreement to the imposition of the special conditions. That rejection would have triggered a violation and a pre-deprivation hearing before a Superior Court judge who would have addressed the new conditions on the merits. The State would have borne the burden of proof and persuasion at the hearing. Dordell elected, however, to sign the agreement and instead pursue a Motion to Review the imposition of the special conditions. His election resulted in a hearing similarly structured three months after the imposition of the special conditions and only four months after his original plea and sentence.

6. For these reasons, we conclude that the probation officer had the statutory authority to impose the special conditions of probation. We further conclude that the September 9, 2003 post-deprivation hearing before the Superior Court judge occurred promptly after the imposition of the enhanced conditions, satisfied due process in the circumstances of this case and that Dordell's liberty interests were not unfairly impacted during the short interim.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

/s/ Myron T. Steele
Justice