

Probationer can refuse to participate in treatment

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The state may not revoke probation because the defendant refuses to admit his crime in court-ordered sex offender treatment, until the time for a direct appeal has expired or an appeal has been denied, the Wisconsin Supreme Court held on Nov. 21.

The court also held that the defendant need not challenge the condition of probation on direct appeal or waive the challenge, but can collaterally attack the condition in the revocation proceeding.

Gary Tate was convicted of repeated sexual assault of a child after a jury trial in which he testified and denied the offense. He was placed on probation and ordered into sex offender treatment.

As a part of the treatment program, he was required to admit the offense. He refused, however, asserting his Fifth Amendment right against self-incrimination.

As a result, he was terminated from the program. He then moved to modify the conditions of probation, requesting that his treatment be stayed until after his appeal. The motion was denied, and he did not appeal this denial to the court of appeals.

In the meantime, his probation was revoked for failure to cooperate with treatment. On certiorari review of the probation revocation, Washington County Circuit Court Judge Leo F. Schlaefter upheld the revocation.

On appeal, the court of appeals affirmed the revocation in a published decision, *State of Wisconsin ex rel. Tate v. Schwarz*, 2001 WI App 131, 246 Wis.2d 293, 630 N.W.2d 761.

The court of appeals agreed with Tate that his Fifth Amendment rights were violated, but held that the objection had been waived, because he had not appealed the denial of his motion to modify the conditions of probation.

The Supreme Court granted review, the State conceded error, and the court reversed in a unanimous decision by Justice Diane S. Sykes.

Self-incrimination

The court concluded that its previous holding in *State v. Evans*, 77 Wis. 2d 225, 234, 252 N.W.2d 664 (1976) - that a probationer cannot be revoked for invoking his privilege against self-incrimination absent a grant of immunity - compels a holding that the revocation of Tate's probation was unconstitutional.

In *Evans*, the court held that compelled admissions about particular instances of criminal activity

by a probationer given in response to questions by a probation agent or at a probation revocation hearing are inadmissible against the probationer in subsequent criminal proceedings. *Evans*, 77 Wis.2d at 235-36.

In *Evans*, the court determined that the state could compel a probationer to answer self-incriminating questions from his probation or parole agent only if he is protected by a grant of immunity that renders the compelled testimony inadmissible in a criminal prosecution.

Applying *Evans*, the court concluded that Tate's Fifth Amendment rights were violated. The court reasoned, "Tate's right to appeal had not yet lapsed at the time he was required to admit, during sex offender treatment, to the crime of which he was convicted. The DOC had required him to sign a release allowing all of his statements during treatment to be used in any court proceeding. Future criminal proceedings were possible in his case, as well as the potential for a perjury prosecution arising out of his trial testimony. The price of remaining silent was probation revocation.

Accordingly, the admissions demanded of him by his treatment program were both self-incriminating and compulsory. Revocation of Tate's probation for refusing to admit his crime of conviction under these circumstances violated his Fifth Amendment right against self-incrimination."

Rebuttal and Impeachment

The court then expanded the holding in *Evans* to encompass rebuttal and impeachment evidence, as well, consistent with U.S. Supreme Court jurisprudence.

In *Evans*, the court expressly limited the immunity rule to direct evidence, and held that it would not apply to use of the probationer's self-incriminating statements in rebuttal or impeachment of inconsistent testimony in a criminal proceeding.

Subsequent to *Evans*, however, the U.S. Supreme Court held in *Minnesota v. Murphy*, 465 U.S. 420, 435 (1984), that, if a probationer is required to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent, his statement cannot be used for any evidentiary purpose in a criminal prosecution.

Accordingly, the court held that any statements a probationer in Tate's position makes under a grant of immunity are forbidden from being used in any way.

Waiver

The court then held that Tate did not waive the Fifth Amendment challenge by failing to appeal its denial by the sentencing court.

Rejecting the court of appeals reasoning, the court concluded, "The court of appeals' waiver rule creates a strange procedural anomaly in which a probationer must seek modification, in the circuit and appellate courts, of any condition of probation that he is alleged to have violated in order to avoid waiving the right to argue against revocation based upon that violation. And the probationer is required, under such a rule, to pursue the modification in the circuit and appellate

courts while simultaneously undergoing revocation and pursuing certiorari review once revoked."

The court noted that the court of appeals cited no authority for its conclusion on waiver, and the parties agreed that none exists.

Further, the court noted that the procedure used by Tate was identical to that in Evans - he contested probation revocation by filing a petition for a writ of certiorari in the circuit court and then appealed the circuit court's denial of his petition.

The court decided, "We did not require in Evans that the defendant first seek relief from the conditions of his probation in the circuit and appellate courts before his constitutional challenge to his revocation would be entertained. We decline to impose such a requirement now." Accordingly, the court reversed.