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Cooper v. State, 134 Nev. 52 (July 26, 2018) (en banc)

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CRIMINAL APPEAL: PROBATION

Summary

The Court invoked its supervisory powers and adopted a rule of admissibility to limit the use of a probationer’s testimony in a subsequent criminal proceeding.

Background

In March 2014, Kamesha Cooper was placed on probation. In July 2016, she was arrested and a criminal complaint was filed alleging possession of false identification and concealment or destruction of evidence in the commission of a felony. The charges were later dismissed because the State needed time to investigate the case.

The Division of Parole and Probation filed two reports alleging probation violations. At the revocation hearing, Cooper’s counsel requested that the district court not allow testimony related to the arrest because Cooper would be placed in a position of having to choose between presenting mitigating evidence at the revocation hearing and incriminating herself regarding the potential charges. The district court acknowledged that Cooper would be prejudiced, but allowed testimony from the arresting officer and the district attorney’s office. However, Cooper did not testify. Based on the testimony, the court revoked Cooper’s probation. This appeal followed.

Discussion

Although probationers are not afforded “the full panoply of constitutional protections,”² the Supreme Court has held that due process at a revocation hearing requires that a probationer be given the opportunity to be heard and to present mitigating evidence.³ The issue in the present action concerns the tension between two important rights: the due process right to be heard and to present mitigating evidence and the right against self-incrimination as to pending or potential criminal charges related to the alleged probation violation.

In *Dail v. State*,⁴ this Court considered whether to allow the holding of a revocation hearing prior to a criminal trial forced the alleged violator to make a constitutionally unfair decision. However, the Court declined to establish a rule and deferred to the legislature. Here, the Court affirmed the decision in *Dail* which stated that the tension between these two rights is not of constitutional import. Rather, the Court found that it is one that involves public policy and fairness.

After considering the various interests involved, the Court determined that these interests are undermined when a probationer is deterred from testifying at their own revocation hearing.

¹ By Xheni Ristani.

² *Anaya v. State*, 96 Nev. 119, 122, 606 P.2d 156, 157 (1980).

³ *Morrissey v. Brewer*, 408 U.S. 471, 488 (1972).

⁴ *Dail v. State*, 96 Nev. 435, 610 P.2d 1193 (1980).

Further, the Court noted that the prosecution in a criminal trial has the burden of presenting sufficient evidence and it must be met before the defendant decides whether to testify. The prosecution's burden is lessened if it is allowed to take advantage of a defendant's testimony at an earlier revocation hearing.

“Basic fairness demands that a defendant must not be forced to forfeit one constitutional right to preserve another constitutional right.”⁵ Although this unfairness does not rise to the level of constitutional deprivation, it is still substantial and necessitates action by the Court on public policy grounds. As such, the Court invoked its inherent supervisory power to adopt a rule to limit the use of a probationer's testimony given at a probation revocation hearing. However, the Court noted an exception for purposes of impeachment in cases where the probationer's revocation hearing testimony and the testimony on direct examination are clearly inconsistent and warrant admission of the revocation hearing testimony. The Court further emphasized that this rule is limited to testimony about the crime at issue.

In the instant case, Cooper acknowledged that she had been advised by her counsel not to testify regarding the circumstances of her arrest and that she felt could not proceed defending her actions without risking her right against self-incrimination. The district court recognized it proceeded despite the predicament before Cooper.

Conclusion

The Court reversed the order revoking probation and remanded the matter to the district court for further proceedings consistent with this opinion.

Dissent

The court's “supervisory powers” do not authorize it to promulgate exclusionary rules that are not statutorily or constitutionally based

NRS 48.025(1),⁶ which allows all relevant evidence to be admitted, is limited either by the Nevada Evidence Code or by the Constitution of the United States or the State of Nevada. Here, the Court invoked supervisory powers to adopt this new exclusionary rule. However, without a basis in statute or the constitution, the new rule conflicts with NRS 48.025(1).

The new exclusionary rule the majority announces will not advance Cooper's cause, as her failure to request such relief in district court confirms

In district court, Cooper asked to postpone the revocation hearing rather than asking the court to let her testify without admitting that testimony in her future criminal proceedings. However, the conduct that led to her arrest crossed state lines, from California, to Nevada, to Utah, and even involved Homeland Security. As such, to reverse and remand would not protect

⁵ *Barker v. Commonwealth*, 379 S.W.3d 116, 123 (Ky. 2012); *see also Simmons v. United States*, 390 U.S. 377, 393–94 (1968).

⁶ NEV. REV. STAT. § 48.025(1) (2017).

Cooper from non-Nevada charges she potentially faces. Therefore, this issue should be deemed waived.

Dail has not proved unworkable

This decision overrules *Dail v. State* without satisfying the requirements by *stare decisis* to overrule existing law. In *Dail*, this Court held that it was for the legislature to decide whether public policy supported adoption of an exclusionary rule. As such, to overrule that decision, it must be shown that compelling, weighty, or conclusive reasons exist for overruling it. Here, the Court fails to meet this burden, thus the case should be affirmed.