EFiled: Aug 23 2019 03:47PM EDT
Filing ID 64127176
Case Number 177,2019

IN THE SUPREME COURT OF THE STATE OF DELAWARE

EDWARD BENSON Defendant Below, Appellant.	:	
v.	:	No. 177, 2019
STATE OF DELAWARE Plaintiff Below, Appellee.	:	ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE I.D. 1210005652A

APPELLANT'S OPENING BRIEF

FILING ID 64127176

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Dated: August 23, 2019

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NATURE OF PROCEEDINGS

On October 11, 2012, Edward Benson was arrested in connection with a shooting. (A1, A34). On the day of his jury trial, Mr. Benson accepted a guilty plea to Assault in the First Degree, a lesser included offense of Attempted Murder in the First Degree. (A12, A19). The Honorable Eric M. Davis sentenced Mr. Benson on June 9, 2014 to 25 years at Level V suspended after 4 years and six months, followed by decreasing levels of supervision. (A19–A23).

On July 27, 2017, the Court found Mr. Benson in violation of probation. (A14). He was re-sentenced to 20 years at Level V, which was immediately suspended for 4 years at Level III with a GPS monitoring device. (A24–A25, A34). The Court noted on its Sentencing Order that it would consider a request to remove the GPS device after 12 months. (A25).

On November 11, 2018, Mr. Benson was arrested and charged with drug and weapons related offenses. (A27–A30). As a result of this new arrest, Mr. Benson was charged with a second Violation of Probation ("VOP"). (A14–A15, A31–A37). A VOP hearing was held on December 6, 2018. (A15). At that initial hearing, the Court agreed to schedule a contested VOP hearing for the following week. (A44, A47). At the next VOP hearing on December 13, 2018, Mr. Benson failed to appear. (A16, A57).

Once Mr. Benson was brought back into Delaware's custody, his VOP Hearing was rescheduled to April 4, 2019. (A16). At that hearing, Mr. Benson was found in violation and re-sentenced to 19 years and 363 days at Level V, suspended after 10 years, followed by decreasing levels of probation. (A69–A71). Mr. Benson filed a timely Notice of Appeal. (A18). This is his Opening Brief.

SUMMARY OF THE ARGUMENT

I. The Superior Court deprived Mr. Benson of the right to due process by proceeding to a violation of probation hearing in the absence of counsel. Mr. Benson reasonably expected to have the assistance of counsel. In light of that expectation, and without a knowing and intelligent waiver of the right to counsel, the sentencing judge committed plain error by denying Mr. Benson a substantial and fundamental right.

II. The Superior Court abused its discretion by sentencing Mr. Benson without first considering the extenuating circumstances that might have justified or mitigated the probation violation. The judge also exhibited bias towards Mr. Benson by instructing the prosecutor to present certain evidence that would establish the violation. Mr. Benson is entitled to a new hearing before a neutral and detached arbiter.

STATEMENT OF FACTS

On November 14, 2018, members of the Governor's Task Force ("GTF") obtained approval to conduct an administrative search of Mr. Benson's home. (A27). GTF found a firearm and ammunition in the basement and cocaine in Mr. Benson's bedroom. (A29). He was subsequently arrested and charged with Possession of a Firearm By a Person Prohibited, Possession of a Firearm During Commission of a Felony, Drug Dealing, and Aggravated Possession. (A72–A73). These charges are currently pending before the Delaware Superior Court in and for New Castle County.

Because Mr. Benson was on Level III probation with a GPS monitor at the time, he was also charged with a VOP. (A31–A37). Probation initially recommended that Mr. Benson be re-sentenced to 20 years at Level V suspended after 5 years, followed by decreasing levels of supervision. (A31). The VOP report alleged that Mr. Benson failed to comply with the three conditions:

> **Condition 1:** You must not commit a new criminal offense . . .
>
> **Condition 6:** You must have written approval of your supervising officer to own, possess, or be in control of any firearm or deadly weapon . . .
>
> **Condition 7:** You are not to possess or consume a controlled substance or any other dangerous drugs unless prescribed lawfully . . .

(A27, A31–A312).

Mr. Benson posted bail and a VOP hearing was scheduled for December 6, 2018. (A15, A44). That morning, Anthony Figlioa, Esq. appeared on his behalf. (A39). Having recently been retained, defense counsel was not prepared to move forward and requested a continuance of the VOP hearing. (A39, A43–A44).

The Court agreed not to move forward, but announced that it had "suggestions." (A44). In particular, the Court instructed that in a VOP hearing, "you could bring – if, for instance, you caught the person with the gun, you can bring the officer in . . . and have the officer testify that he was in possession of the gun." (A45–A46). After the State advised that it wanted to do that, the Court continued on:

> Okay. Well, let's do it for next Thursday. We'll keep the same terms and conditions of bond. You'll sign for notice, and we'll have a contested Violation of Probation Hearing. I don't know why people – it doesn't have to wait until the next charges, because we're not going to adjudicate those charges. We're going to adjudicate the [VOP], and the [VOP] can be that he's in possession of a firearm. I think that's probably more than just a technical violation. I don't believe – I think all violations are violations, but you don't have to wait. You can get the officer in.

(A46).

The VOP hearing was rescheduled to December 13, 2018; however, Mr. Benson failed to appear. (A57). His GPS monitor had been removed and Mr. Benson lost contact with his probation officer. (A50–A51). He was eventually

detained in Maryland and returned to the State of Delaware in March of 2019. (A57, A59–A60).

Another VOP hearing was scheduled for April 4, 2019. (A16, A57).[1] Counsel once again appeared to represent Mr. Benson. (A56). At the outset, Mr. Benson's Probation Officer, John Moyer, asked the judge whether he received a copy of the supplemental report. (A57). The judge replied, "No I don't think I did, I have one dated [November 28, 2018]." (A57). Mr. Moyer then provided the Court with a Supplemental VOP report dated April 3, 2019. (A57).

This Supplemental report added Mr. Benson's failure to report as an additional basis for violating his probation. (A50–A51). It also amended probation's sentencing recommendation. (Compare A31 with A50). Mr. Moyer requested that Mr. Benson serve 10 years, not 5 years, at Level V incarceration. (A50). Ultimately, the Court did not adjudicate the three conditions listed in the initial VOP report. (A57, A67). Instead, the judge announced:

> I can go forward with the absconsion charge . . . I'll let the officer get on the stand and I'll ask him whether Mr. Benson has reported.
> It's a big deal to ask for a continuance of this Court in order to have a contested violation of probation hearing and then fail to show even though you met with your lawyer the night before and cut off your GPS device, it's a big deal.

(A57–A58).

[1] Prior to the hearing, Mr. Benson requested a continuance to challenge the validity of the administrative search. The Court denied his request. (A57–59).

At that point, Mr. Benson's counsel informed the Court that he wished to represent himself. (A58). This discussion followed:

COURT: What, at the violation of probation?

COUNSEL: At the violation hearing.

BENSON: Is that what is today, the violation?

COUNSEL: Yes.

COURT: Okay. Well, I mean, there's no Constitutional right to representation at a violation of probation hearing. Understand that what the Court is actually going to have happen today is I'm going to have the officer testify about the absconding. If you want to file a motion to suppress, I'd rather you do it in the other case.

(A58).

The Court did not go through a colloquy with Mr. Benson regarding his decision to waive the right to representation and to proceed *pro se*. (A58). Mr. Benson then voiced his concerns about the validity of the administrative search. (A58–A59). Immediately after, and upon questioning by the Court, Mr. Benson admitted that he failed to report to probation and cut off his GPS device. (A59). The Court then heard testimony from Mr. Moyer concerning these violations. (A60–A61).

Mr. Benson was asked if he had any witnesses. (A61). Although he initially attempted to call Mr. Figlioa as a witness, Mr. Benson elected not to waive the attorney-client privilege. (A61). Instead, he testified on his own behalf and

explained that he needed to attend important medical appointments to treat his Multiple Sclerosis ("MS"). (A62–A64). Mr. Benson testified that he faced a "choice of evils" and felt as though he had to choose between coming to Court and receiving the necessary medical treatments. (April 4 Tr. at 31–32).

The judge found Mr. Benson in violation for failing to report to probation, removing his GPS device, and leaving the State of Delaware without permission. (April 4 Tr. at 42–44). He was re-sentenced to 19 years and 363 days at Level V, suspended after 10 years, followed by decreasing levels of probation. (A68, A69–A71).

I. APPELLANT WAS DEPRIVED OF THE RIGHT TO DUE PROCESS AT A VIOLATION OF PROBATION HEARING WHEN THE TRIAL COURT PROCEEDED IN THE ABSENCE OF A KNOWING AND INTELLIGENT WAIVER OF THE RIGHT TO COUNSEL.

A. Question Presented

Whether due process requires a knowing and intelligent waiver of the right to counsel in a probation violation hearing when the defendant faces a significant period of incarceration and suffers from a serious medical condition? This issue was not raised in the trial court below.[2] However, the right to due process and, by extension, the right to counsel is so fundamental that the interests of justice require consideration of the merits on appeal. The record reveals that Mr. Benson was deprived of a substantial right during his VOP hearing.

B. Standard and Scope of Review

This Court will generally decline to review contentions not raised below and not fairly presented to the trial court for decision.[3] But, the Court may excuse a waiver if it finds that "the trial court committed plain error requiring review in

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[2] Sup. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented."). At the VOP hearing, Mr. Benson's counsel announced that he wished to represent him *pro se*. (A58).

[3] Sup. Ct. R. 8; *see also, Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986); *Jenkins v. State*, 305 A.2d 610 (Del. 1973).

the interests of justice."[4] "Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[5] "Furthermore, the doctrine of plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice."[6]

C. Argument

1. Applicable Legal Precepts

A probationer is entitled to certain minimum requirements under the Due Process Clause of the Fourteenth Amendment.[7] The Delaware Superior Court Criminal Rules set forth procedural requirements regarding revocation of probation hearings that are intended to comport with the protections of the Due Process Clause.[8] Delaware Superior Court Criminal Rule 32.1 provides:

> (a) Revocation of partial confinement or probation. Whenever a person is taken into or held in custody on the grounds that the person has violated a condition of partial confinement or probation, the person shall be brought without unreasonable delay before a committing magistrate or a judge of Superior Court for the purpose of fixing bail and, if not released on bail, shall be afforded a prompt hearing before a

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[4] *Monroe v. State,* 652 A.2d 560, 563 (Del.1995); *Mathis v. State,* 950 A.2d 659 (Del.2008).
[5] *Wainwright,* 504 A.2d at 1100; *Dutton v. State,* 452 A.2d 127, 146 (Del.1982).
[6] *Wainwright,* 504 A.2d at 1100; *Bromwell v. State,* 427 A.2d 884, 893 n. 12 (Del.1981).
[7] See *Gagnon v. Scarpelli,* 411 U.S. 778, 786 (1973).
[8] Del. Super. Crim. R. 32.1.

judge of Superior Court on the charge of violation. The person shall be given:

(A) Written notice of the alleged violation;

(B) Disclosure of the evidence against the person;

(C) An opportunity to appear and to present evidence in the person's own behalf;

(D) The opportunity to question adverse witnesses; and

(E) Notice of the person's right to retain counsel and, in cases in which fundamental fairness requires, to the assignment of counsel if the person is unable to obtain counsel.

However, a probationer does not have an absolute Sixth Amendment right to counsel at probation violation hearings.[9] The United States Supreme Court has suggested that counsel should be provided when the probationer raises a timely and colorable claim (i) that he has not violated his probation, or (ii) that substantial reasons justified or mitigated the violation, making revocation inappropriate, or that the reasons are complex or difficult to develop or present.[10]

2. Appellant Did Not Knowingly And Intelligently Waive The Right to Counsel.

In allowing Mr. Benson to proceed *pro se*, the Court claimed that there was "no Constitutional right to representation at a violation of probation hearing."[11] But

[9] *Willis v. State*, 856 A.2d 1067, at *1 (Del. 2004) (citing *Jones v. State,* 560 A.2d 1056, 1057 (Del. 1989)).
[10] *Jones*, 560 A.2d at 1058 (quoting *Gagnon,* 411 U.S. at 790).
[11] A58.

it misstated the law. Although the right is not absolute, this is an exceptional case. The judge, and the parties, expected the VOP hearing to be contested.[12] And although Mr. Benson ultimately admitted the violation, his admission came after the Court allowed Mr. Benson to represent himself without assessing whether his decision was made knowingly and intelligently.

Before the judge may permit a probationer to waive his right to counsel and represent himself, the judge should "determine that the defendant has made a knowing and voluntary waiver of his constitutional right to counsel," and, (2) "inform the defendant of the risks inherent in going forward [in a VOP hearing] without the assistance of legal counsel."[13] In this case, the Court should have carefully questioned Mr. Benson about his decision to waive the right to counsel.

Mr. Benson's medical history is complex and difficult to present without the assistance of counsel. For example, Mr. Benson attempted to explain that he was not in a handicap accessible cell and if he loses his "balance and fall[s], it's dangerous. It's just hard to describe, but it's really hard."[14] Neither the Court nor the State disputed that Mr. Benson has MS.[15] Furthermore, the probation officer's

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[12] A46.
[13] *Drummond v. State*, 15 A.3d 216, *2 (Del. 2011).
[14] A66.
[15] A64 ("For the record, the State's not disputing that you have MS."), A67 ("I'm sorry that you have MS . . .").

sentencing recommendation doubled from five to ten years. Without the benefit of counsel, Mr. Benson could not properly advocate for a less severe sentence.

3. Appellant Was Denied Due Process.

Because Mr. Benson did not knowingly and intelligently waive his right to counsel, he was denied due process at the VOP hearing. Although he did not have an absolute right to the assistance of counsel, a probationer in Mr. Benson's situation would reasonably assume that he would either continue to be represented by an attorney or, having a proper understanding the risks, would represent himself.[16]

The interests of justice require reversal of the judgment of the Superior Court. The VOP hearing should not have proceeded in the absence of an attorney or a valid waiver of the right to counsel. This matter must be remanded to the Superior Court for a new VOP hearing at which Mr. Benson is warned of the risks of proceeding without counsel.

[16] See *Willis*, 856 A.2d 1067 at *2 (Del. 2004) (holding that probation revocation hearing without assistance of public defender violated defendant's right to due process, where public defender appeared at bail hearing on probation violation, public defender was not granted leave to withdraw, and reasonable person in defendant's situation would have expected public defender to appear at hearing).

II. THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING APPELLANT WITH A CLOSED MIND AND FAILING TO ACT AS A NEUTRAL ARBITER.

D. Question Presented

Whether a sentencing judge abuses their discretion by failing to consider mitigating circumstances and instructing the State on how to prove the violation? The issue was preserved at the contested VOP Hearing on April 4, 2019.[17]

E. Standard and Scope of Review

This Court reviews sentencing of a criminal defendant for abuse of discretion.[18] It is well-established that appellate review of sentences is extremely limited.[19] Thus, generally speaking, our review ends upon a determination that the sentence is within the statutory limits prescribed by the legislature.[20] Where the sentence falls within the statutory limits, we consider only whether it is based on factual predicates which are false, impermissible, or lack minimal reliability, judicial vindictiveness or bias, or a closed mind.[21]

F. Argument

1. Applicable Legal Precepts

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[17] Issue preserved at A44–A46 (failure to remain neutral), A65–A68 (sentenced with closed mind).
[18] *Kurzmann v. State*, 903 A.2d 702, 714 (Del. 2006).
[19] *Id*. (citing *Mayes v. State,* 604 A.2d 839, 842 (Del.1992).
[20] *Mayes,* 604 A.2d at 842 (quoting *Ward v. State,* 567 A.2d 1296, 1297 (Del.1989)).
[21] *Weston v. State,* 832 A.2d 742, 746 (Del. 2003) (citing *Siple v. State,* 701 A.2d 79, 83 (Del.1997); *Mayes,* 604 A.2d at 842-43).

The Due Process Clause of the Fourteenth Amendment "requires a fair trial in a fair tribunal, before a judge with no actual bias against the defendant or interest in the outcome of his particular case."[22] "Our adversarial system of justice assumes that the judge is a neutral, detached, impartial arbiter and not a partner with the state's prosecutorial arm seeking to have the defendant adjudicated guilty."[23] "A judge sentences with a closed mind when the sentence is based on a preconceived bias without consideration of the nature of the offense or the character of the defendant."[24] Moreover, "the judge must have an open mind for receiving all information related to the question of mitigation."[25]

2. The Judge Was Biased Against Appellant And Sentenced Him With A Closed Mind.

At the hearing held on December 4, 2018, the Superior Court—before ever hearing any evidence as to the basis for Mr. Benson's alleged probation violation—declared that "the violation of probation can be that he's in possession of a firearm. I think that's probably more than just a technical violation."[26] In fact, the judge admitted that he believed "all violations are violations."[27] And he dismissed Mr.

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[22] *Butler v. State*, 95 A.3d 21, 40 (Del. 2014) (citations omitted).
[23] *Id*. at 35.
[24] *Weston,* 832 A.2d at 746.
[25] *Id*.
[26] A46.
[27] A46.

Benson's medical condition as "self-serving, self-pity."[28] These comments suggested that the Court had already made up its decision as to the merits of the violation and the appropriate sentence.[29] Although it is not "improper for a sentencing judge to mount the bench with some preconceived notion about the proper sentence to be imposed, [] we think it quite improper for him at that point to have closed his mind upon the subject."[30] When that occurs, as it did here, "due process is lacking and the sentence must be struck and the cause remanded for the imposition of sentence in the proper fashion."[31]

In addition to having a closed mind, the record reveals evidence of a preconceived bias by the sentencing judge. In particular, the Court coached the State as to how it could establish Mr. Benson's VOP. The judge provided a "suggestion" to "bring the officer in . . . and have the officer testify that he was in possession of the gun."[32] The judge also advised that the VOP hearing "doesn't have to wait until the next charges, because we're not going to adjudicate those charges. We're going to adjudicate the [VOP], and the [VOP] can be that he's in possession of a firearm."[33]

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[28] A67.
[29] See *Bailey v. State*, 450 A.2d 400, 406 (Del. 1982) (resentencing required where sentencing judge announced that "many months" before sentencing he had "reached the decision as to the sentence [he] would impose").
[30] *Bailey*, 450 A.2d at 406 (citing *Osburn v. State*, 224 A.2d 52, 53 (Del. 1966)).
[31] *Id*.
[32] A46.
[33] A46.

These are not the actions of a neutral, detached arbiter. Rather, they evidence the judge's bias against Mr. Benson and a desire to have him violated, regardless of any extenuating circumstances.

Simply put, the Superior Court failed to act as an independent decisionmaker.[34] Mr. Benson is entitled to a new VOP hearing before an impartial judge.

[34] *Gibbs v. State*, 760 A.2d 541, 543 (Del. 2000) (due process "requires that a probationer receive notice of the alleged violations of probation, an opportunity to appear and present evidence, a conditional right to confront adverse witnesses, and ***an independent decisionmaker***.") (emphasis added).

CONCLUSION

For these reasons, Appellant Edward Benson respectfully requests that this Court reverse the Superior Court's judgement and remand for a new hearing and sentencing on the violation of probation.

Respectfully submitted,

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