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Case Number 177,2019

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT'S REPLY BRIEF

FILING ID 64500473

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Dated: December 9, 2019

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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. Argument

The State claims that Mr. Benson had no right to counsel at his Violation of Probation ("VOP") hearing.[1] But in its Answering Brief, the State disregards Mr. Benson's reasonable expectation that he would continue to be represented by counsel and, instead, attacks the merits of his medical excuse.[2] The State's response misses the mark.

The question before this Court is not whether Mr. Benson's medical excuse provided sufficient justification for violating his probation. To be sure, Mr. Benson admitted the violation and the State conceded that he suffers from a serious autoimmune disorder.[3] Rather, the question is whether a probationer, having retained an attorney and facing a significant period of incarceration, should be informed of the risks of proceeding without the assistance of counsel at a revocation hearing? Mr. Benson maintains that the answer is yes.

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[1] State's Answering Brief ("Answer") at 14.

[2] Answer at 16 (". . . the fair inference from the record is that this purported medical excuse was insufficient to justify both failing to attend a hearing, and by extrapolation, insufficient to justify both failing to attend a hearing and absconding from probation for over three months.")

[3] A59, A64.

Although Mr. Benson was not indigent, the record reflects that he expected the attorney he retained for a contested violation hearing would, in fact, represent him.[4] But defense counsel told the judge that he was "not sure" he had a defense for absconding and Mr. Benson did not "seem to understand" his advice.[5] Still, the Court declined to "go through a colloquy with respect to the representation in this case."[6] Not surprisingly, Mr. Benson then admitted to violating his probation.[7]

Even if Mr. Benson was not entitled to the assistance of counsel, once counsel appeared on his behalf, the Superior Court should have probed whether Mr. Benson's waiver was made knowingly and intelligently.[8] The United States Supreme Court has emphasized that due process is an imprecise concept and, therefore, must be measured by the interests at stake.[9] Here, Mr. Benson's liberty

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[4] At the outset, defense counsel explained to the Court that he had requested to continue the VOP hearing until after he could file a motion challenging the administrative search underlying Mr. Benson's new charges. A57.

[5] A57–A58.

[6] A58.

[7] A59.

[8] Accord *U.S. v. Welty*, 674 F.2d 185, 189 (3d Cir. 1982) (quoting *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948)) ("A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances . . . and only after bringing home to the defendant the perils he faces in dispensing with legal representation.").

[9] See *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31 (1981) (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 788 (1973)).

was at stake. He received a decade-long prison sentence, but as the State noted, faced up to nearly twenty years' incarceration.[10]

Given the seriousness of the case, Mr. Benson's reasonable expectation of representation, and his complex medical condition, the Superior Court should have taken extra care to ensure Mr. Benson knowingly and intelligently relinquished his right to counsel. Its' failure to do so violated the Due Process Clause of the Fourteenth Amendment and demands a new hearing at which Mr. Benson is warned of the risks of proceeding without counsel.

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[10] Answer at 17–18 ("At that point, the Superior Court…sentenced Benson to serve only half of the time remaining on his suspended sentence.").

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

A. Argument

The State attempts to place the judge's comments into a context that diminishes their impropriety. For example, the State claims that when the judge declared that "the Violation of Probation can be that [Mr. Benson is] in possession of a firearm,"[11] it was merely explaining the VOP process.[12] Ultimately, the State dismisses each instance of bias as the Court explaining the process to Mr. Benson or stressing the importance of compliance.[13] The record does not support this contention.

Before ever hearing any evidence or considering any mitigation for Mr. Benson's alleged probation violation, the judge 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."[14] This comment speak to the merits of the violation, not the violation process. And it strains credulity to suggest that the comment was made for Mr. Benson's benefit. Instead, the Court's pronouncement confirmed Mr. Benson's fear that his probation would be revoked. Although he acknowledged that

[11] A46.
[12] Answer at 20.
[13] Answer at 21.
[14] A46.

this fear did not justify his actions, he felt as though he faced a "choice of evils."[15] Mr. Benson realized that the judge had already made a decision.

While the Court did not move forward on the alleged firearm violation because Mr. Benson failed to appear,[16] the bias it exhibited at the December 4, 2018 hearing also permeated the April 4, 2019 hearing. There, the judge adamantly pushed to "go forward with the absconsion charge" and stated he would "let the officer get on the stand and [] ask him whether Mr. Benson has reported."[17] The Court showed little patience for Mr. Benson's explanation and questioned him in a manner that closely resembles a confrontational cross-examination.[18] The Court's desire to revoke Mr. Benson's probation, regardless of any extenuating circumstances, is unmistakable.

Finally, the State concludes its argument by drawing attention to *pro se* sentence modification motions filed by Mr. Benson following the VOP hearing.[19] In its view, these filing "show why [Mr. Benson] continues to be a threat to society."[20]

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[15] A63–A64.
[16] A16 (Dkt. at 112).
[17] A57–A58.
[18] *E.g.*, "What about the fact that you disappeared for three months, aren't you supposed to report monthly?" (A59); "Did you cut off your GPS device?" (A59); "Are you representing on the record that the bail bondsman knew were you were and didn't tell the Court where you are?" (A63); "Did you tell the doctors and the people at Bear Imaging that you were on the run and subject to a capias for your arrest?" (A65).
[19] Answer at 22–23.
[20] Answer at 23.

But these post-hearing, *pro se* filings cannot provide justification for the Court's preconceived sentencing decision. They are not a part of the record, as they were not presented to the court below, and should not be considered in deciding the merits of this appeal.

In sum, the record demonstrates that the judge failed to act as an independent decisionmaker.[21] Mr. Benson is entitled to a new VOP hearing before an impartial judge.

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[21] *Gibbs v. State*, 760 A.2d 541, 543 (Del. 2000) (due process requires "an independent decisionmaker.").

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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CERTIFICATE OF COMPLIANCE WITH
TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

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1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word for Mac 2016 (Version 15.29.1).

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 1,576 words, which were counted by Microsoft Word for Mac 2016 (Version 15.29.1).