SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
ROBERT J. JONES
JUDGE

MIDDLESEX COUNTY COURTHOUSE
P.O. BOX 964
NEW BRUNSWICK, N.J. 08903-0964

August 29, 2018

VIA JUDICIARY CONTRACT MESSANGER
And FIRST CLASS MAIL

Superior Court of New Jersey
Appellate Division Clerk's Office
Attn: Team 1
Hughes Justice Complex
25 W. Market Street
Trenton, NJ 08625-0006

Re: State of New Jersey v. Thomas Hawkins
Appellant: Thomas Hawkins
Docket No.: A-004409-16/ A-005777-17

Dear Sir/Madam:

Please find enclosed an Amended Opinion Amplification dated August 3, 2018 in the captioned matter.

Thank you.

Very truly yours,

HONORABLE ROBERT J. JONES, J.S.C.

/sk
Enclosures

cc: Carol M Henderson, Esq., Attorney General
Akesha Williams, Assistant Prosecutor
Molly O'Donnell Meng, Esq.
Alexander R. Shalom, Esq.
Claire Drugach, Esq.

If you require any accommodations as a result of a disability, please call 732-519-3207

Not for Publication Without the Approval of the Committee on Opinions

State of New Jersey, Plaintiff, v. **Thomas Hawkins,** Defendant.	**Superior Court of New Jersey** Law Division, Criminal Part Middlesex County Ind. No.: 12-02-0380-Z Criminal Action **Amended Opinion**

Decided August 3, 2018

Akesha Williams, Assistant Prosecutor, argued the cause for the State of New Jersey (Andrew C. Carey, Middlesex County Prosecutor, attorney; Akesha Williams, of counsel and on the brief).

Molly C'Donnell Meng, Assistant Deputy Public Defender, argued the cause for the defendant, Thomas Hawkins (Joseph E. Krakora, Public Defender, attorney; Molly O'Donnell Meng, of counsel and on the brief; Megan Crespo, on the brief).

Alexander R. Shalom argued the cause for amicus curiae American Civil Liberties Union of New Jersey (Alexander R. Shalom, of counsel and on the brief).

Robert J. Jones, J.S.C.

Based on two separate arrests in 2011, Thomas Hawkins pled guilty to second-degree drug distribution (Indictment 12-02-380) and third-degree drug distribution in a school zone (Indictment 11-08-1383). The plea called for an eight-year sentence with four years of parole ineligibility, and it recognized that Hawkins would apply for drug court. It also indicated that if Hawkins were found ineligible for drug court, he would be permitted to retract his plea.

Rather than sentence Hawkins to state prison for his crimes, Judge Sheila Venable granted his drug-court request and sentenced him to four years of special probation, as permitted by N.J.S.A. 2C:35-14. The sentencing took place in April 2012.

After sentencing, the court transferred Hawkins's probation to Middlesex County, where he lived. Once there, he began his time in the drug-court program, where he was expected to comply with a set of probation conditions and attend treatment. That is where problems arose. Because Hawkins failed to comply, his probation officer filed a violation of probation (VOP), which the court heard on May 17, 2016.

Hawkins pled guilty to the VOP, but rather than sentence him to state prison, Judge Harold Fullilove gave him another chance and allowed him to remain in the drug-court program. The judge did, however, extend the probation term by a year, which resulted in a five-year drug-court term ending on April 26, 2017.

Despite the second chance, Hawkins continued to violate his drug-court conditions. As a result, probation filed a second VOP, which Judge Fullilove heard on March 29, 2017. Hawkins pled not guilty to the violation, and as a result, the judge held a hearing where the State presented multiple witnesses to support the allegations against him. Hawkins was represented by counsel at the hearing, and his attorney cross examined each of the witnesses. Hawkins chose not to present any witnesses on his own behalf, even though given the opportunity.

Judge Fullilove found Hawkins guilty on five out of seven charges. After noting how this was Hawkins's second VOP, the judge found him no longer suitable for drug court, and because of this, terminated drug-court probation. He then sentenced Hawkins to eight years in prison with four years of parole ineligibility.

Hawkins appealed. A two-judge panel then remanded the matter so the trial court could provide a "detailed statement of reasons" for its decisions and so Hawkins could be given the chance to speak at sentencing. In the meantime, though, Judge Fullilove had retired. As a result, the matter came to me for resentencing.

At the resentencing, I also terminated probation and sentenced Hawkins to state prison for eight years. After considering the aggravating and mitigating factors, though, I came to a different conclusion in deciding parole ineligibility: Rather than four years of parole ineligibility, I sentenced Hawkins to 40 months.

Hawkins did not appeal the resentence. But he did move to correct it, claiming that it is "illegal." In doing so, he maintains he had a right to have a jury decide whether he violated probation. According to Hawkins, his time in drug court (just short of five years) combined with his prison sentence (eight years) results in a 13-year sentence (which he says is beyond the ten-year maximum for a second-degree crime). He equates the combined period to a sentence enhancement, and he argues that under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington*, 542 U.S. 296 (2004), he is entitled to have a jury decide the facts leading to the enhancement (namely, the facts at the probation-revocation hearing). This opinion explores whether he is correct.

Analysis

The issue Hawkins raises really boils down to this: Do *Apprendi* and *Blakely* preclude a judge from deciding whether a defendant violated the conditions of his drug-court probation in these circumstances? For the reasons that follow, the answer is no. A

probation-revocation proceeding is fundamentally different from the original conviction and sentence. As explained further, the charges that underlie a probation violation do not equate to a criminal prosecution. Moreover, the VOP sentence merely authorizes a sentence already authorized by the original conviction.

Before looking at *Apprendi* and *Blakely's* effect on probation revocation, if any, it is important to understand what these cases stand for. In *Apprendi*, the United States Supreme Court held that any fact that increases the penalty for a crime beyond that set out in the statutory maximum must be submitted to a jury and must be proven beyond a reasonable doubt. 530 U.S. at 491. In *Blakely*, the Court reaffirmed *Apprendi*, holding that a sentencing enhancement must be based on the jury verdict alone (unless based upon an established conviction). With this understanding in mind, I will now turn to the statutory scheme involved.

When a defendant is convicted of a crime that carries with it a presumption of incarceration or mandatory minimum period of parole ineligibility, a court may sentence the defendant to five years of drug-court probation if the defendant meets certain eligibility requirements. *See* N.J.S.A. 2C:35-14(a). The statutory provision that allows a court to resentence a defendant after drug-court termination is contained in N.J.S.A. 2C:35-14(f)(4). It states that "[i]f the court permanently revokes the person's special probation ... the court shall impose any sentence that might have been imposed, or that would have been required to be imposed, originally for the offense for which the person was convicted or adjudicated delinquent." *Id.*

As noted above, Hawkins believes that his time on drug-court probation, combined with his prison sentence, equates to a sentence enhancement because the combined period exceeds the ten-year maximum sentence for a second-degree crime.[1] Thus, he says, "[t]his sentencing scheme results in an increase in penalty above the statutory maximum based on judicial fact-finding" and violates the constitution, as interpreted in *Apprendi* and *Blakely*. (Def. Brf. At 6).

I disagree with Hawkins for multiple reasons. For starters, to the extent Hawkins suggests that the court should combine his probation time and his prison time into an aggregate "sentence" that exceeds the ten-year maximum for a second-degree crime, he overlooks the principle that probation and imprisonment are not fungible. *See United States v. Granderson*, 511 U.S. 39, 47 (1994). Probation constitutes conditional liberty. *Id.* It is an opportunity to avoid prison and does not equate to prison. The statute sets a maximum for *prison* time. Thus, I do not buy the notion that combining the two periods results in a sentence above the maximum (i.e., a sentence enhancement).

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[1] According to Hawkins, the statutory scheme would not violate the constitution if it provided day-for-day credit (akin to jail credit) for time served on probation.

More importantly, though, Hawkins's argument overlooks some key distinctions between an original sentencing and a VOP sentencing. Notably, the Supreme Court has never extended *Apprendi* beyond original sentencing. In fact, federal courts examining the post-*Apprendi* constitutionality of the federal supervised-release scheme have held that it remains constitutional.[2] As noted by the Fifth Circuit, a defendant on supervised release is not entitled to have a jury decide his or her case beyond a reasonable doubt at a revocation proceeding, and *Apprendi* does not change this. *United States v. Hinson*, 429 F.3d 114, 119 (5th Cir. 2005).

Granted, supervised release and probation are not identical. Nevertheless, based on the similarities, federal courts looking at the two programs (as well as parole) have considered them analogous when examining the constitutionality of revocation proceedings. *See United States v. Hall*, 419 F.3d 980, 985 n.4 (9th Cir.), *cert. denied*, 546 U.S. 1080(2005) ("Parole, probation, and supervised release revocation hearings are constitutionally indistinguishable and are analyzed in the same manner). As explained by the Second Circuit, "the constitutional guarantees governing revocation of supervised release are identical to those applicable to revocation of parole or probation." *United States v. Jones*, 299 F.3d 103, 109 (2d Cir. 2002); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.3 (1973) (noting how commentators agree that the differences are "constitutionally indistinguishable"). The federal cases examining revocation of supervised release are therefore significant, as they uniformly reject arguments similar to those Hawkins makes here.

Beyond this, probation revocation takes place after the conviction on the underlying offense is complete. The proceedings do not alter the elements of the crime, and they do not authorize a sentence not already authorized by the jury verdict. Instead, the proceedings simply revoke the defendant's conditional liberty. As the Supreme Court explained, "'[r]evocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special ... restrictions.'" *Gagnon v. Scarpelli*, 411 U.S. 778, 781 (1973) (stating this in the context of parole revocation) (quoting *Morrisey v. Brower*, 408 U.S. 471, 480 (1972)). Thus, revocation is not part of the criminal proceeding. *Id.*; *State v. Mosely*, 232 N.J. 169 (2018) ("New Jersey courts have viewed VOP hearings as 'a part of the corrections process' rather than an element of the criminal prosecution.") (further citation omitted).

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[2] *See United States v. Carlton*, 442 F.3d 802, 807 (2d Cir. 2006); *United States v. Dees*, 467 F.3d 847, 853 (3d Cir. 2006), *cert. denied*, 552 U.S. 830, 128 S. Ct. 52, 169 L. Ed. 2d 45 (2007); *United States v. Faulks*, 195 F. App'x 196, 198 (4th Cir. 2006) (unpublished), *cert. denied*, 552 U.S. 809, 128 S. Ct. 38, 169 L. Ed. 2d 10 (2007); *United States v. Huerta-Pimental*, 445 F.3d 1220, 1225 (9th Cir.), *cert. denied*, 549 U.S. 1014, 127 S. Ct. 545, 166 L. Ed. 2d 403 (2006); *United States v. Cordova*, 461 F.3d 1184, 1186-88 (10th Cir. 2006); *United States v. Hinson*, 429 F.3d 114, 119 (5th Cir. 2005), *cert. denied*, 547 U.S. 1083, 126 S. Ct. 1804, 164 L. Ed. 2d 540 (2006); *United States v. Work*, 409 F.3d 484, 491 (1st Cir. 2005); *United States v. Coleman*, 404 F.3d 1103, 1104 (8th Cir. 2005).

Imprisonment is also not punishment for the violation; it is punishment for the original crime. *Johnson v. United States*, 529 U.S, 694, 700-01 (2000). In fact, the violation charges resulting in revocation are often not crimes themselves. Most often the charges result from the defendant violating conditions that do not constitute criminal offenses. Criminal juries traditionally decide whether a defendant violated terms of enacted statutes. Notably, the Sixth Amendment applies to "criminal prosecutions." *U.S. Const. amend VI.* A revocation proceeding is not a criminal prosecution.

Recognizing these differences, the Supreme Court has determined that probation revocation does not carry with it the full bundle of constitutional rights associated with a criminal prosecution. *See Gagnon*, 411 U.S. 778; *United States v. Knight*, 534 U.S. 112, 120 (2001). "[T]he trial rights of a jury and proof beyond a reasonable doubt, among other things, do not apply." *Id.* (citing *Minnesota v. Murphy*, 465 U.S. 420, 435 n.7 (1984)); *see also, State v. Zachowski*, 53 N.J. Super. 431, 440 (App. Div. 1959) (defendant charged with probation violation is not entitled to indictment or jury trial). While courts must safeguard due process, these proceedings only require "an informal hearing." *Morrisey*, 408 U.S. at 484.

Our own Supreme Court recently recognized these principles in *Mosely*. In examining the due-process rights associated with a probation-revocation hearing, the Court in *Mosely* noted the "minimal process" required during revocation proceedings. 232 N.J. at 183. In fact, that court quoted *Morrissey* for the proposition that revocation proceedings do not even require a hearing in front of judicial officers and could be held in front of, for example, a parole board. *Id.* at 183 (quoting *Morrissey*, 408 U.S. at 489).

It comes down to this: Courts consistently hold that revocation proceedings do not carry with them all the constitutional rights associated with a criminal prosecution. The Supreme Court based these decisions on the nature of the proceedings and the fact that they are post-sentencing. It would be odd to think that *Apprendi*, which involved original sentencing, would alter the way courts look at revocation proceedings, which are post-sentencing. *Apprendi* did not change the nature of the revocation proceedings. Nor did it suggest that those who undergo revocation proceedings are entitled to constitutional rights beyond those previously recognized.

In addition, because probation is authorized by the original conviction, the consequences for violating the conditions of that probation are also authorized. As previously noted, the resentencing punishes the original crime, not the condition violations. Thus, even were I to combine Hawkins's probation time and prison time as he suggests, the facts from his original conviction authorize these consequences. This is true because the statute provides for them (i.e., provides both for probation and for up to maximum prison time for the crime upon violation). *See* N.J.S.A. 2C:35-14(f)(4). In other words, his criminal conviction authorized the sentence he received. There was no enhancement.

For all these reasons, I reject Hawkins's argument and hold that he was not entitled to have a jury find beyond a reasonable doubt that he violated the terms of his probation.

The court will enter an order consistent with this opinion.