5-23-2012

State v. McLeod Appellant's Reply Brief Dckt. 38886

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38886
	)	
v.	)	
	)	
YUTDENY MCLEOD,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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STATEMENT OF THE CASE

Nature of the Case

On appeal, Ms. McLeod asserts that the district court erred when it overruled her objection to the use of statements obtained from her in violation of the Fifth Amendment at a probation violation hearing, which resulted in her probation being revoked and the original sentence being executed without reduction.

In its Respondent's Brief, the State advances several arguments in favor of affirming the district court's order revoking probation. Among those arguments are a claim that the Fifth Amendment does not protect probationers from interrogation by law enforcement, exclusion from probation violation hearings of statements taken in violation of the Fifth Amendment is not a remedy that this Court should adopt, and because one probation violation finding is not contested on appeal, the district court did not err in revoking her probation. (Respondent's Brief, pp.11-14.)

This Reply Brief is necessary to address the State's arguments enumerated above. With respect to the State's other arguments, Ms. McLeod will rely on the arguments set forth in her Appellant's Brief.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Ms. McLeod's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference.

ISSUES

1. Does the Fifth Amendment protect probationers against interrogation by law enforcement personnel?

2. Is exclusion of statements taken in violation of the Fifth Amendment an appropriate remedy in probation violation proceedings?

3. If this Court vacates the violation for failing to obey all laws because it was based on improperly admitted statements, may this Court otherwise affirm the district court's order revoking probation based on the remaining violation?

ARGUMENT

I.

The Fifth Amendment Protects Probationers Against Interrogation By Law Enforcement Personnel

In its Respondent's Brief, the State argues,

> The Fifth Amendment right to silence, however, is not "available to a probationer" such that the state may compel answers to incriminating questions in relation to probation violations "as long as it recognizes that the required answers may not be used in a criminal proceeding." Minnesota v. Murphy, 465 U.S. 420, 435 n.7 (1984).
>
> Probationers have fewer rights they can assert against governmental intrusion than do other citizens. Probation officers can, and do, require probationers to answer questions, on threat of probation violation, about whether they are complying with the conditions of probation. The state "may validly insist on answers to even incriminating questions" as part of its probation system. Murphy, 465 U.S. at 435 n.7. Because McLeod did not have a legal right against compelled self incrimination or to counsel in relation to questions about whether she was in compliance with the terms of probation, there can be no legal violation of her rights in the failure to tell her she had such a right. See State v. Aldape, 794 P.2d 672 (Kan. 1990) (statements to probation officer about compliance with probation are not incriminating under Fifth Amendment and therefore evidence of such statements is admissible in probation violation proceedings regardless of whether Miranda warnings were given).

(Respondent's Brief, pp.13-14.)

The main problem with the State's argument is that it concerns questioning conducted *by probation officers of their probationers* pursuant to a state's administration of its probation system. That is not the situation in which Ms. McLeod made the statements at issue. Ms. McLeod was interrogated by an agent of the federal government's Immigration and Customs Enforcement agency, not her probation officer. Unlike the situation described in the footnote in *Murphy*, the interrogation of Ms. McLeod was not conducted as part of the State's administration of its probation system. The

reasoning employed by the United States Supreme Court in *Murphy* does not deprive Ms. McLeod of her Fifth Amendment rights when she is interviewed by someone other than an agent of the probation department.

II.

Exclusion Of Statements Obtained In Violation Of The Fifth Amendment Is The Appropriate Remedy In Probation Violation Proceedings

In its Respondent's Brief, the State argues,

> [E]xclusion is inappropriate in probation violation proceedings. "Most federal courts of appeal that have considered whether the exclusionary rule should apply to probation revocation hearings have concluded that it should not." Commonwealth v. Vincente, 540 N.E.2d 669, 671 ([Mass.] 1989) (citing United States v. Bazzano, 712 F.2d 826, 830 (3rd Cir. 1983) (and cases cited)). The reason for this is that reliable evidence should be available to serve the purposes of probation and excluding reliable evidence from probation proceedings will not serve the deterrent effect behind the exclusionary rule. Id. (citing United States v. Winsett, 18 F.2d 51 (9th Cir. 1975)).

(Respondent's Brief, p.14.)

The first problem with the State's argument is that, as the Supreme Judicial Court of Massachusetts acknowledged in its opinion in *Vincente*, "the Federal cases we have cited all involve evidence seized in violation of the probationer's Fourth Amendment rights. Vincente has not argued that a different result is required under Federal law if the evidence is obtained in violation of the Miranda [sic] warnings." *Vincente*, 540 N.E. 2d at 671-72 (footnote omitted).

Neither the Fifth Amendment nor its remedy (exclusion of statements) is the same as the exclusionary rule that applies to violations of the Fourth Amendment. For example, the United States Supreme Court has refused to apply the Fourth Amendment's "fruit of the poisonous tree" doctrine to *Miranda* violations, and has

explained, "'The exclusionary rule, . . . when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth.'" *Oregon v. Elstad*, 470 U.S. 298, 304-07 (1985) (ellipsis in original) (quoting *Brown v. Illinois*, 422 U.S. 590, 601 (1975)). It is clear that the exclusionary rule that applies to statements obtained in violation of *Miranda* is not the same as the exclusionary rule that applies to Fourth Amendment violations. The State's reliance on a single Massachusetts case and its attempt to conflate the Fourth Amendment's exclusionary rule with the Fifth Amendment's exclusionary rule is misplaced.

III.

If This Court Vacates The Violation For Failing To Obey All Laws Because It Was Based On Improperly Admitted Statements, Then It Must Remand This Matter To The District Court For A Redetermination Of Whether To Revoke Probation

In its Respondent's Brief, the State argues,

> The state alleged that McLeod violated her probation by 1) failing to report to probation and parole as instructed and 2) failing to obey all municipal, county, state and federal laws by illegally re-entering into the United States. (R., pp.130-31.) On appeal, McLeod does not contest the district court's finding that she violated her probation by failing to report to probation and parole as instructed. Nor were any of her statements to Agent Rees used in proving this violation. Rather, she solely contests the use of her statements to support the state's allegation that she committed a crime by illegally re-entering the United States. However, because her probation could be revoked for the violation that she failed to report to probation as ordered, she has failed to show that the district court erred in revoking her probation.

(Respondent's Brief, pp.11-12.)

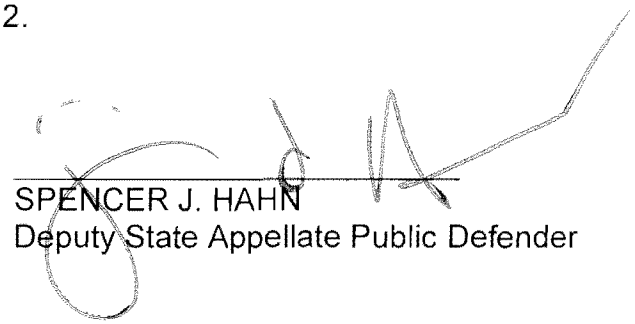
Aside from the fact that the State provided no citation to authority for its argument that this Court may affirm a revocation of probation despite concluding that one of the violations relied upon was improperly found, its argument is contradicted by this Court's

case law. *See State v. Blake*, 133 Idaho 237, 243 (1999) (remanding matter for redetermination of whether to revoke probation after one of two violations was vacated on appeal).

CONCLUSION

For the reasons set forth in her Appellant's Brief, and in this Reply Brief, Ms. McLeod respectfully requests that this Court vacate the district court's order revoking her probation, and remand this matter for a new probation hearing at which her statements to Agent Rees will not be considered.

DATED this 23rd day of May, 2012.



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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 23rd day of May, 2012, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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