Appendix 7H

Training Memo—Legal Considerations in Probation Violations Based on a New Offense

When a probation violation is based upon an allegation of a new crime, Minn.R.Crim.P. 27.04, Subd. 2(4) allows, but does not require, the hearing on the violation to be postponed until after resolution of the new criminal case. This is true even when the probationer is held in custody on the violation. Despite the permissive language of Rule 27.04, double jeopardy, collateral estoppel and the prohibition against compelled self-incrimination have all been advanced as reasons that the violation hearing must be postponed until after the resolution of the criminal case. With the possible exception of collateral estoppel[1], none of these theories supports a postponement of the probation revocation hearing.

Double Jeopardy

Double jeopardy does not apply because "revocation of probation or parole is regarded as reinstatement of the original sentence rather than punishment for the more recent misconduct."[2] Thus, even if the probation violation is decided prior to a new criminal charge, the resolution of the probation violation will not bar prosecution of the new offense.

Compelled Self-Incrimination

The Fifth Amendment prohibits statements made under compulsion from being used against the declarant. In this regard, compulsion includes loss of a right or privilege. Holding a revocation hearing prior to the criminal trial based on the same event forces the defendant to chose between remaining silent at the revocation hearing or taking the stand and making statements that may be used against him during the criminal case. There is universal agreement that this dilemma does not create a constitutional requirement that the probation revocation hearing be postponed until after the resolution of the new charge as long as the defendant's silence is not used against him.[3] Nor, is there any

[1] "Collateral estoppel" is a legal principle preventing a party from relitigating an issue that has already been decided against that party in another legal proceeding.

[2] *State v. McKenzie*, 542 N.W.2d 616, 620 (Minn. 1996).

[3] *State v. Phabsomphou*, 530 N.W. 2d 876 (Minn. Ct.App. 1995). *Accord*: *United States v. Jones,* 299 F. 3d 103 (1st Cir. 2002); *United States v. Bazzano,* 712 F. 2d 826 (3rd Cir. 1983) *(*en banc).

constitutional requirement that the court provide use immunity[4] for any statements made during a revocation hearing held prior to the related criminal trial. [5]

The same rule applies based on the exercise of supervisory powers. There is no requirement that courts, in the exercise of their supervisory powers, postpone probation violation proceedings until after the resolution of the criminal case unless limited use immunity is provided. The Minnesota Court of Appeals has stated that the district court is not obligated "to unilaterally offer a defendant limited-use immunity at the revocation hearing."[6]

The decision to proceed with the probation violation hearing prior to resolution of the new charge is reviewed under an abuse of discretion standard. Regardless of whether use immunity was granted or offered, the Minnesota appellate courts have upheld the decision to proceed with the revocation hearing prior to trial in all reported cases.[7]

The choice to forego the perceived advantage of testifying at a hearing on a related matter for fear of adversely affecting the outcome of a criminal case is not unique to probation revocation hearings. Regulatory proceedings, employment disciplinary proceedings, professional licensing proceedings and civil suits are just a few of examples of the multitude of parallel civil and criminal proceedings in which the choice can arise. Continuing criminal conduct such as drug sales or check forgeries that give rise to multiple prosecutions are examples of some of the situations in which the choice arises wholly within the criminal law.

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[4] "Use Immunity" prevents the State from using information provided by the Defendant in one proceeding against the Defendant in a subsequent proceeding.

[5] *Phabsomphou*, 530 N.W. 2d 876. *Accord: Jones,* 299 F. 3d 103; *Bazzano,* 712 F. 2d 826; *Ryan v. State of Montana,* 580 F.2d 988 (9th Cir. 1978), *cert. denied,* 440 U.S. 977 (1979); *United States v. Brugger,* 549 F. 2d 2 (7th Cir.), *cert. denied,* 431 U.S. 919 (1977); *United States v. Markovich,* 348 F.2d 238 (2nd Cir. 1965).

[6] *State v. Hamilton,* 646 N.W.2d 915, 919 (Minn. Ct.App. 2002). *See also: Phabsomphou*, 530 N.W. 2d 876.

[7] *Use immunity granted or offered*: *Phabsomphou*, 530 N.W. 2d 876; *Moore*, 207 WL 2917461. *No use immunity offered or granted*: *Hamilton,* 646 N.W.2d 915 (the defendant did not request limited-use immunity and the court had no duty to unilaterally offer limited use immunity, particularly where the probation violation could rest on proof of probable cause alone); *State v. Hazelton*, 2003 WL 21007892 (Minn.Ct.App. 2003), unpublished opinion (proceeding on the revocation hearing was not an abuse of discretion where the defendant did not ask for immunity and did not testify about the new charge); *In Re the Welfare of M.G.B.* 2006 WL 340876 (Minn.Ct.App. 2006) (no grant of use immunity but the defendant was allowed to assert his Fifth Amendment right to remain silent when questioned about the incident which led to his arrest.).

The defendant in a probation revocation proceeding is not faced with a qualitatively different choice than any one else facing parallel proceedings related to the same set of facts. No defendant could successfully argue that he must be given use immunity as to his testimony at the first of a series of criminal trials. Nor could he successfully argue that the court, in the exercise of its supervisory powers, should dictate the order of trial in a way that minimizes his exposure to criminal consequences.

Collateral Estoppel

"Collateral estoppel may be applied when: (1) the issue was identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or in privity with a party to the prior adjudication; and, (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue."[8] In this regard, there is a final judgment on the merits when the decision on the claim is "'not tentative, provisional or contingent and represents the completion of all the steps in the adjudication of the claim by the court'".[9]

The issue of whether the State will be estopped from relitigating at a criminal trial an issue decided adversely to it at a probation revocation proceeding has not been decided by the Minnesota courts. In cases where different prosecutor's offices are responsible for presenting the State's case at the probation revocation hearing and criminal trial the *Lemmer* court's reasoning would preclude the application of collateral estoppel. However, in many domestic violence cases the same prosecutor's office will be responsible for both the probation revocation hearing and the criminal trial. In those cases, the reasoning of the Lemmer court points to the conclusion that the technical requirements of collateral estoppels are met.

Even if the technical requirements for collateral estoppel have been met, it will not be applied if its application would be unfair. [10] The majority of jurisdictions do not apply collateral estoppel to bar the State from relitigating at trial an issue

[8] *State v. Lemmer*, 736 N.W. 2d 650, 659 (Minn. 2007).

[9] *Lemmer*, 736 N.W. 2d at 659.

[10] *Lemmer*, 736 N.W.2d at 650,659.

decided against it at a probation revocation hearing.[11] Policy considerations against the application of collateral estoppel appear to underlie the cases following the majority rule, even when the case also finds a technical requirement of collateral estoppel has not been met. The following policy considerations have been cited in support of the majority rule:

1. The State does not have the same incentive to present its best evidence at the revocation hearing with its lower standard of proof and more limited purpose.[12]
2. The State frequently will not have had time to complete its investigation before the revocation hearing.[13]
3. It is not in society's best interests to require the state to complete its entire investigation before seeking to revoke probation.[14]
4. There are two separate interests represented by two separate entities being addressed at the two proceedings—the probation department's interest in the swift enforcement of probation conditions and the prosecutor's interest in presenting the strongest possible case in its effort to enforce the criminal law.[15]
5. Subjecting the defendant to both a probation revocation and criminal trial is not the kind of vexatious litigation the rule was designed to prevent.[16]
6. The procedural and substantive differences between the two proceedings make application of collateral estoppel unfair.[17]
7. There is an overriding societal interest in seeing that the criminal matters are resolved correctly in a criminal trial. [18]

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[11] *State v. Brunet*, 806 A.2d 1007, 1010 (Vt. 2002). *See also:* Annotation, *Determination that the State Failed to Prove Charges Relied Upon for Revocation of Probation as Barring Subsequent Criminal Action Based on Same Underlying Charges*, 2 A.L.R.5th 262 (1992).

[12] *Brunet*, 806 A.2d at 1012.

[13] *Brunet*, 806 A.2d at 1011-12.

[14] *Brunet*, 806 A.2d at 1013

[15] *Krotcha v. Commonwealth*, 711 N.E.2d at 148 (Mass. 1999).

[16] *Lucido v. Superior Court*, 795 P.2d 1223, 1232 (Cal. 1990).

[17] *State v. Brunet*, 806 A.2d at 1011; *People v. Hilton*, 166 A.D.2d 233, 235 (N.Y. App.Div. 1999)

[18] *Hilton*, 166 A.D.2d at 235; *Lucido*, 795 P.2d at 1229.

Given the strength of these policy considerations, it is likely that Minnesota will follow the majority of other jurisdictions in declining to apply collateral estoppel to prevent the State from relitigating an issue decided adversely to it at a prior probation revocation hearing. This is particularly true in domestic violence cases where the need for swift and sure consequences to protect the public safety argues in favor of proceeding expeditiously with the probation revocation hearing.