Challenging Hearsay In Probation Revocation Hearings

By William L. Pfeifer, Jr., Foley, AL

A commonly misunderstood issue in probation revocation proceedings is the use of hearsay testimony. Whenever a defense lawyer objects to the introduction of hearsay evidence, the prosecution quickly responds, "hearsay is admissible in probation revocation hearings." The judge typically nods in agreement and overrules the objection. Too many attorneys simply shrug their shoulders and listen as the hearsay rolls in, without realizing there are still ways to challenge the use of hearsay evidence to revoke probation. Despite what prosecutors and judges may lead you to believe, you still may have the opportunity to block the revocation of your client's probation through a properly phrased objection and argument.

In the case of *Armstrong v. State*, 312 So. 2d 620 (1975), the Alabama Supreme Court established the guidelines which must be followed in order to provide a probationer with minimal due process. Among those was the requirement of "the right to confront and cross-examine adverse witnesses (unless the judge specifically finds good cause for not allowing confrontation)." *Id,* at 623. While it is in the judge's discretion to admit hearsay evidence in probation revocation hearings, hearsay cannot serve as the sole basis for revocation of a defendant's probation. *Ex parte Belcher*, 556 So. 2d 366 (Ala. 1989); *Mitchell v. State*, 462 So. 2d 740 (Ala. Crim. App. 1984).

A common way for the hearsay issue to arise is when a probation officer attempts to testify concerning a probationer's arrest on new criminal charges. It is unlikely that the probation officer will have first-hand knowledge of the alleged crime, and typically the probation officer's testimony is based solely on his or her reading of a police report. In *Hill v. State,* 350 So. 2d 716 (Ala. Crim. App. 1977), a probation officer's testimony provided the sole evidence regarding a probationer's arrest on new charges. The Alabama Court of Criminal Appeals held that use of such testimony denied the probationer of minimal due process of law because "[t]he use of such hearsay evidence denied the appellant the right to confront and cross-examine the persons who originated the factual information which formed the basis for revocation of his probation." *Id*. at 718. Similarly, in *Mallette v. State*, 572 So. 2d 1316 (Ala. Crim. App, 1990), it was held that a probation officer's testimony that a probationer failed two drug tests was insufficient to prove the alleged violations because the probation officer was not the one who actually performed the tests.

This issue may also arise during the course of an arresting officer's testimony. In *Beckham v. State*, 872 So. 2d 208 (Ala. Crim. App. 2003), an arresting officer testified that he had used an audio transmitter worn by a confidential informant to monitor a drug sale. The audiotape was not offered at the hearing, and the officer testified he could not identify the probationer's voice. Thus, the only evidence that the probationer was involved in the drug sale was the officer's hearsay testimony that the informant told him the probationer was the seller. The Alabama Court of Criminal Appeals held that "[b]ecause hearsay testimony may not form the sole basis for the revocation of probation, the trial court erred when it revoked Beckham's probation on this particular charge." *Id*. at 211. Almost identical facts involving confidential informants appeared again in *Nash v. State*, 931 So. 2d 785 (Ala.Crim. App. 2005), and in the recent case of *Hall v. State*, ___ So. 2d ___ WL 866657 (Ala. Crim. App. 2007), where the court reaffirmed that "hearsay testimony cannot form the sole basis for revocation of probation."

For additional authority supporting this holding and additional fact situations in which the hearsay issue arises, review cases such as *Ex parte J.J.D*., Jr., 778 So. 2d 241 (Ala. 2000); *Goodgain v. State*, 755 So. 2d 591 (Ala. Crim. App. 1999); *Clayton v. State*, 669 So. 2d 220 (Ala. Crim. App. 1995); and *Chasteen v. State*, 652 So. 2d 319 (Ala. Crim. App. 1994).

In response to the hearsay argument, prosecutors sometimes claim that an arrest in and of itself is a violation of the terms and conditions of probation. Thus, they claim, they do not have to prove the underlying offense. However, Alabama case law is clear that a mere arrest is not sufficient to revoke probation. "Before revoking probation because the probationer has been arrested, the trial court must be reasonably satisfied that the underlying charge against the probationer is true." *Wade v. State*, 652 So. 2d 335, 336 (Ala. Crim. App. 1994). "A 'mere arrest' or the filing of charges is an insufficient basis for revoking one's probation." *Clayton v. State*, 669 So. 2d 220, 221 (Ala. Crim. App. 1995), quoting *Allen v. State*, 644 So. 2d 45, 46 (Ala. Crim. App. 1994).

By objecting to the use of hearsay to revoke probation and by intelligently arguing the law to the trial court, you may find yourself having more success in probation revocation hearings than you expected. ●

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