NOT FINAL UNTIL TIME EXPIRES FOR REHEARING, AND IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY
APPELLATE DIVISION

ALEXIS ELAINE MARTINEZ,
Appellant,

v.

STATE OF FLORIDA,
Appellee.
_____/

UCN: 512020AP000005APAXWS
Case No.: 20-AP-5
L.T. No.: 19-MM-0158

On appeal from Pasco County Court,
Honorable Debra Roberts

Maria Christine Perinetti, Esq.,
for Appellant,

Ashley Miller,
Assistant State Attorney,
for Appellee.

ORDER AND OPINION

Because the trial court incorrectly refused to consider trial counsel's attempt to invoke Appellant's Fifth Amendment right against self-incrimination, and because the trial court misadvised Appellant regarding the circumstances under which she could invoke that right herself, the trial court's judgment and order of probation entered after finding that Appellant violated probation must be reversed and the case remanded for a new hearing.

STATEMENT OF THE CASE AND FACTS

Appellant pled no contest to possession of marijuana and possession of paraphernalia. Adjudication was withheld and the trial court sentenced her to 12 months' probation. An affidavit of violation of probation (VOP) was filed alleging that Appellant had violated probation condition #5 by using cocaine. The affidavit alleged that cocaine use was shown by a positive drug screening test result.

During the VOP final hearing, Appellee called two witnesses, probation officer Sherri Cook and Appellant. Cook testified to Appellant's conditions of probation and that those conditions were explained to Appellant. Cook did not testify regarding Appellant's cocaine use or the drug screening test result. Nor was the test result itself admitted into evidence.

The only evidence of Appellant's cocaine use was Appellant's own testimony. Appellee first asked Appellant if she passed her drug screening on August 20, 2019; to which Appellant testified that she had not. Appellee then asked Appellant if she recalled the drug she used that resulted in the failed drug screening. Appellant's trial counsel objected and attempted to invoke Appellant's Fifth Amendment right against self-incrimination on her behalf. The trial court refused to permit trial counsel's attempted invocation. Appellant then testified that she used cocaine.

Appellee asked Appellant if she was aware that cocaine was an illegal substance. Before Appellant could answer, the trial court said the following to Appellant:

> Ms. Martinez, if there is a criminal case, you have the right to refuse to speak, you understand that, or incriminate yourself if there's a pending criminal case out there? You understand that? You have a Fifth Amendment right not to answer the question if you got pending cases regarding this, ma'am. You understand?

Hearing Tr. p. 12. Appellant stated that she was not aware of any pending criminal cases.

After testimony and argument, the trial court found that Appellant had violated probation. The trial court changed Appellant's withholds of adjudication to adjudications of guilt, sentenced her to 30-days in the Pasco Sheriff Office's Operation Payback program, and continued probation for four months. Appellant timely-appeals.

STANDARD OF REVIEW

Interpretation of a constitutional provision is reviewed *de novo*. *Lewis v. Leon County*, 73 So. 3d 151, 153 (Fla. 2011).

LAW AND ANALYSIS

1. Attorneys can invoke their clients' right against self-incrimination

A federal court's interpretation of the United States Constitution controls in state courts. *Miami Herald Publishing Co. v. Ane*, 423 So. 2d 376, 384-85 (Fla. 3d DCA 1982).[1] The United States Court of Appeals for the Sixth Circuit[2] has held that a witness's attorney is not legally precluded from invoking the witness's Fifth Amendment right against self-incrimination on that witness's behalf during a trial. However, whether or not to permit the invocation is at the discretion of the trial court judge. *United States v. Mayes*, 512 F. 2d 637, 649 (6th Cir. 1975), cert. denied, 422 U.S. 1008 (1975).

In this case, Appellant's trial counsel attempted to invoke her Fifth Amendment right against self-incrimination before Appellant could respond to Appellee's question regarding Appellant's drug use. The trial court erred by telling Appellant's trial counsel that "you don't get to [invoke] her Fifth Amendment rights, she does. She can say it, but you can't." *Hearing Tr. p. 11*. It appears that the trial court believed that a defendant's trial counsel can never invoke a defendant's right against self-incrimination on the defendant's behalf. If so, such a belief was erroneous.

2. A defendant in a violation of probation proceeding has a limited right against self-incrimination regardless of whether a criminal charge is pending

A defendant in a violation of probation final hearing does not completely forfeit her Fifth Amendment right against self-incrimination. However, the right is qualified. *Watson v. State*, 388 So. 2d 15, 16 (Fla. 4th DCA 1980). While a defendant does not have a Fifth Amendment right to refuse to disclose a non-criminal probation violation, she does have a Fifth Amendment right "applicable to conduct and circumstances concerning a separate criminal offense." *Perry v. State*, 778 So. 2d 1072, 1073 (Fla. 5th DCA 2001). This right is not limited to whether a criminal prosecution is actually pending but extends to answers which "might incriminate [her] in future criminal proceedings." *Lefkowitz v. Turley*, 414

[1] The parties and the trial court addressed only the Fifth Amendment to the United States Constitution. However, the right against self-incrimination is also codified in Florida's state constitution. *See* Art. I, § 9, Fla. Const. That said, even if this Court were interpreting Article I, section 9 of the Florida Constitution alongside or instead of the Fifth Amendment to the United States Constitution, the result would be the same. While a state can grant a citizen broader rights than those contained in the Fifth Amendment, a state cannot grant fewer rights. The United States Constitution is the floor, not the ceiling. *Rigterink v. State*, 3 So. 3d 221, 240-41 (Fla. 2009).

[2] This Court could not find any federal 11th Circuit or United States Supreme Court case law addressing this issue.

U.S. 70, 77 (1973). *See also United States v. Cuthel*, 903 F.2d 1381, 1384 (11th Cir. 1990) ("A witness may property invoke the privilege when he 'reasonably apprehends' a risk of self-incrimination . . . though no criminal charges are pending against him").

In the instant case, Appellee did not limit its direct examination of Appellant to questions regarding the result of the drug screening. Rather, Appellee also asked Appellant which drug she had *used*. Therefore, that portion of the direct examination asked Appellant to offer testimony of criminal conduct against herself. *See* §893.13(6)(a), Fla. Stat. ("A person may not be in actual or constructive possession of a controlled substance . . ."). Despite the risk of self-incrimination, the trial court misadvised Appellant that she could only invoke her right against self-incrimination if there were charges pending. As a result of this misadvice, Appellant's testimony that she used cocaine was admitted into evidence.

3. The errors were not harmless

Errors regarding a defendant's invocation of the right against self-incrimination are subject to harmless error analysis. *Cf. Phillips v. State*, 621 So. 2d 734, 736 (Fla. 3d DCA 1993) (citing *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1985), and finding that a prosecutor's statement regarding the defendant's exercise of his privilege against self-incrimination was harmless). After reviewing the record in this case, the Court holds that the trial court errors were not harmless.

There were only two pieces of evidence supporting the trial court's finding that Appellant violated her probation by using cocaine: her testimony that she failed a drug screening and her testimony that she used cocaine. Had trial counsel or Appellant successfully invoked her right against self-incrimination, only her testimony regarding the drug screening test result would have remained.

Appellant's testimony regarding the drug screening test result was hearsay. *See Williams v. State*, 553 So. 2d 365, 365-66 (Fla. 5th DCA 1989).[3] While hearsay evidence is admissible in a VOP final hearing, it cannot be the sole basis for a finding that a defendant violated probation. *Wheeler v. State*, 344 So. 2d 630, 632 (Fla. 2d DCA 1977).

[3] In *Williams*, the State attempted to admit the result of a drug test through a witness. *Id*. However, because the witness was not involved with the testing, the Fifth District held that the drug test result was hearsay not subject to any exception. *Id*. at 366. In the instant case, Appellee did not even attempt to admit the drug test result itself. Appellee attempted to admit the result of the drug test through Appellant's testimony.

CONCLUSION

The trial court erred by refusing to consider trial counsel's attempt to invoke Appellant's Fifth Amendment right against self-incrimination on her behalf and misadvised Appellant that she could only invoke that right if there was a pending criminal charge. Had Appellant or her trial counsel successfully invoked her right against self-incrimination, it is likely that the only evidence of Appellant's cocaine use would have been hearsay. While admissible, this hearsay evidence would have been legally insufficient by itself to result in a finding that Appellant violated probation. For this reason, the Court holds that the trial court's errors regarding Appellant's Fifth Amendment right against self-incrimination and her trial counsel's attempt to invoke same were not harmless. Accordingly, a new VOP hearing is required.

It is therefore ORDERED and ADJUDGED that the trial court's order granting Appellee's motions to suppress is hereby REVERSED and the case REMANDED for proceedings consistent with this Opinion.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida this ___ day of _____, 2020.

Original Order entered on December 29, 2020, by Circuit Judges Daniel D. Diskey, Kimberly Campbell, and Lauralee Westine.

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