

July 18, 2007

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Re: Commonwealth of Virginia v. Stuart B. Dickens
Case No. CR05000929-01

Dear Counsel:

The purpose of this letter is to set forth the Court's ruling on the Defendant's Motion for Rehearing filed in the captioned matter.

BACKGROUND

The Court conducted a Probation Revocation Hearing in this cause on April 6, 2007 during which the Defendant raised an objection to the admission of an affidavit from the custodian of the Virginia State Police records of sex offender registrations. The Defendant had been previously ordered by this Court on March 22, 2005 to continue to register as a Sex Offender and was placed on five years indeterminate supervision and five years good behavior. The affidavit offered on April 6, 2007 stated that the Defendant had failed to so register. The Court entered an Order on April 13, 2007 that, *inter alia*, re-suspended all but two years of the five years that had been previously suspended. On May 2, 2007, the Court entered an Order to Vacate Sentencing Order to allow counsel to submit legal memoranda and to argue whether or not the Court's decision to admit the affidavit was proper. The Court heard oral argument in this matter on June 29, 2007 and has considered the memoranda of law submitted by both counsel.

ANALYSIS

At the April 6, 2007 hearing and in subsequent pleadings, the Defendant has objected to the admission into evidence of an affidavit from the Virginia State Police indicating that he failed to maintain current registration as a sex offender. The Defendant contends that the admission of the affidavit would violate his Sixth Amendment right to confront his accusers. In support of his position, he cites the landmark decision of the Supreme Court of the United States in Crawford v. Washington, 541 U.S. 36 (2004), which prohibits the admission of out-of-court testimonial statements unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine that declarant.

By its express language, the Sixth Amendment applies to "criminal prosecutions." U.S. Const. Amend. VI. As the Commonwealth has indicated, the U. S. Supreme Court has held that "[p]robation revocation, like parole revocation, is not a stage of criminal prosecution" even though it may result in a loss of liberty. Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973). In Gagnon, the Court held that there is no difference between "the guarantee of due process" for probation revocation and for parole revocation. Id. at 782. It follows, then, that because "the full panoply of rights due a defendant" in a criminal prosecution does not extend to parole revocation proceedings, neither does that "panoply" of rights apply in a probation revocation hearing. Morrissey v. Brewer, 408 U.S. 471, 480 (1972). For this reason, the Court concludes that the Sixth Amendment and Crawford do not apply in the instant case; and, thus do not bar the admission of the State Police affidavit into evidence. Please see United States v. Palmer, 463 F. Supp. 2d 551, 553 (E.D. Va. 2006) ("the rules announced in Crawford...do not apply to probation revocation hearings").

It is clear from the decisions in Morrissey and Gagnon, however, that the Defendant is entitled to some due process rights in the present proceeding. In Morrissey, the Supreme Court held that, in parole revocation proceedings, the "minimum requirements" of due process include "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause)." Morrissey, 408 U.S. at 489. Morrissey also provided, however, that because parole revocation is a "narrow inquiry," the full constitutional protections afforded to defendants in criminal prosecutions do not attach and states are free to employ a "process...flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." Id. As noted above, the decision in Gagnon indicates that defendants should be afforded the same due process rights in probation revocation proceedings as in parole revocation proceedings.

This Court has attempted to resolve the apparent inconsistency in Morrissey by examining the Court of Appeals of Virginia opinion in Bobby Jasper v. Commonwealth, 49 Va.

App. 749 (2007). Jasper appealed a trial court's admission of his Department of Motor Vehicles (DMV) transcript, over his Confrontation Clause objection, to prove that his operator's license had been revoked and that he had notice of the revocation. The Court of Appeals reviewed relevant portions of Crawford, decisions from "several of our sister courts," and its own opinion in Michels v. Commonwealth, 47 Va. App. 461 (2006). The Court held that where a challenged document was generated as a result of a request by law enforcement personnel for a search of public records, where the person completing the search was the custodian of the records searched, and where the underlying records were not created in anticipation of the litigation in which a summary of their contents was offered into evidence, then the admission of the challenged document does not violate an appellant's Confrontation Clause rights. Jasper at 756-757.

Jasper does not directly control the present case because, as previously noted, the Sixth Amendment does not apply to probation revocation proceedings. Jasper is instructive, however, because the Court finds that the affidavit at issue in this case is similar to the DMV transcript at issue in Jasper. The State Police affidavit certifies that the registration documents that the Defendant is required to file are absent from State Police records. Although the affidavit was prepared by a law enforcement officer, it was "prepared in a non-adversarial setting in which 'the factors likely to cloud the perception of an official engaged in the more traditional law enforcement functions of observation and investigation of crime are simply not present.'" Michels v. Commonwealth, 47 Va. App. at 469 (quoting State v. Dedman, 136 N.M. 561, 568, 102 P.3d 628, 635 (N.M. 2004)). Under Jasper, it seems to the Court that, even in a criminal prosecution, admission of the State Police affidavit would not violate the Confrontation Clause. It follows, then, that the admission of the affidavit in this probation violation proceeding would not vitiate the due process guarantee of confrontation set forth in Morrissey.

The Court also notes that the Crawford decision marked a significant shift in Sixth Amendment jurisprudence. The Court remains convinced that one cannot fairly, reasonably equate the due process guarantee of confrontation of adverse witnesses contained in Morrissey with the markedly more robust Sixth Amendment confrontation guarantee elucidated by the U. S. Supreme Court in Crawford more than thirty years later.

Furthermore, the Court declines defense counsel's invitation to adopt the balancing test employed by the U. S. District Court in the Palmer case. The Court will simply accept the affidavit pursuant to the official records exception to the hearsay rule. Please see §18-29 in Charles E. Friend's treatise, The Law of Evidence in Virginia, (5th ed. 1999).

Page 4

RE: Commonwealth v. Dickens

HOLDING

For the above reasons, the Motion for Rehearing is denied. As indicated to counsel and to the Defendant at the hearing on April 6, 2007, the Court finds the Defendant in violation of his probation, and re-imposes the four years, eleven months, and 20 days of incarceration that had been previously suspended. The Defendant shall serve two years in the Virginia State Penitentiary, and the Court will re-suspend the remainder of the incarceration. In addition, the Defendant will be placed on indeterminate supervised probation for five years following his release from incarceration, and, as a condition of probation, he is ordered to maintain current registration (and re-registration) as a sex offender which he is required to do by Virginia Code §§9.1-903 and 9.1-904.

The Court thanks both counsel for their thorough oral arguments at the June 29, 2007 hearing and for their exemplary written submissions to the Court.

The Clerk of Court will prepare an Order that essentially reinstates the Court's April 13, 2007 rulings. Copies of that Order will be sent to counsel.

Sincerely,

Alfred M. Tripp
Judge

AMT/nm