

IN THE SUPREME COURT OF THE STATE OF NEVADA

KAMESHA JOANN COOPER,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Electronically Filed
Mar 23 2017 08:16 a.m.
Elizabeth A. Brown
Clerk of Supreme Court
Docket No. 71402

**Appeal from Probation Revocation
First Judicial District Court, Carson City
The Honorable James E. Wilson**

Respondent's Answering Brief

Meredith N. Beresford, Deputy District Attorney
Nevada State Bar: # 13308
Carson City District Attorney's Office
885 East Musser Street, Suite #2030
Carson City, NV 89701
(775) 887-2072
Attorney for the State of Nevada

Sally DeSoto
Nevada State Bar: # 8790
511 E. Robinson St.
Carson City, Nevada 89701
(775) 684-1080
**Attorney for Appellant
Kamesha Joann Cooper**

TABLE OF CONTENTS

I.	TABLE OF AUTHORITIES	iii
II.	Statement of the Issues.....	1
III.	Statement of the Case.....	1
IV.	Summary of the Argument.....	3
V.	Argument	3
A.	The District Court did not err in admitting testimony of laws violations at the revocation hearing because the decision to invoke the Fifth Amendment or testify in this case did not impermissibly impair the policies behind the Fifth Amendment.....	3
B.	If the Court is disinclined to follow the rationale in <i>McGautha</i>, it could develop an Evidentiary Rule as done in <i>Coleman</i>.....	
VI.	Conclusion.....	7
VII.	VERIFICATION AND CERTIFICATE OF COMPLIANCE.....	9
	CERTIFICATE OF SERVICE	11

I. TABLE OF AUTHORITIES

<i>Cases</i>	<u>Page</u>
<i>McGautha v. California</i> , 402 U.S. 183, 91 S. Ct. 1454 (1971).....	3,4,5,6
<i>Gagnon v Scarpelli</i> , 411 U.S. 778 (1973).....	3
<i>Morrissey v Brewer</i> , 408 U.S. 471 (1972).....	3,4
<i>Anaya v. State</i> , 96 Nev. 119 (1980)	3,4
<i>United States v. Yarbrough</i> , 852 F.2d 1522, (9th Cir.) (1988).....	4,5,6
<i>United States v. Nolan</i> , 700 F.2d 479 (9th Cir.), <i>cert. denied</i> , 462 U.S. 1123, 103 S.Ct. 3095 (1983).....	5
<i>Bonin v. Calderon</i> , 59 F.3d 815, 839 (9th Cir.) (1995).....	5
<i>Newton v. Rumery</i> , 480 U.S. 386, 393-94, 107 S. Ct. 1187 (1987).....	5
<i>Corbitt v. New Jersey</i> , 439 U.S. 212, 218-19, 99 S. Ct. 492 (1978).....	5
<i>People v. Coleman</i> , 13 Cal.3d 867, 889 (1976).....	7

1 **II. STATEMENT OF THE ISSUES**

- 2 1. Whether the District Court should have continued Appellant's Probation
3 Revocation hearing as it pertains to the violation of laws and erred in
4 hearing testimony regarding the violation of laws due to the possibility
5 of criminal charges in another jurisdiction.
6

7
8 **III. STATEMENT OF THE CASE**

9 On March 25, 2014, the Appellant Kamesha Cooper (hereinafter "Cooper")
10 was convicted of burglary and was placed on probation with a suspended sentence
11 of 24-72 months in the Nevada Department of Corrections. Appellant's Appendix,
12 hereinafter "AA", at 118. An initial violation report was filed on April 4, 2016
13 alleging violations for Reporting; Residence; Directives and Conduct, the Special
14 Condition of obtaining a substance abuse evaluation and Financial Obligations.
15 AA at 1-2. A Supplemental Violation Report was filed on July 28, 2016 alleging
16 additional violations of Intoxicants and Laws. AA at 4-5. On September 8, 2016,
17 Cooper appeared before Judge Wilson in the First Judicial District Court, with the
18 assistance of counsel, for a probation revocation hearing. AA at 13.
19
20
21
22

23 The attorney for Cooper advised the Court that her client was informed of
24 her Fifth Amendment right and she advised her client to remain silent. AA at
25 17:1-11. Judge Wilson acknowledged Cooper's difficult decision whether to
26 testify at the revocation hearing, potentially incriminating herself in another
27
28

1 jurisdiction, or to remain silent. AA at 60:20-61:2. During the revocation hearing,
2 Elko Deputy District Attorney, Chad Thompson, testified regarding the criminal
3 charges in Elko. Mr. Thompson indicated that the initial charges filed were
4 dismissed without prejudice pending further investigation and the need to obtain
5 admissible records for the purposes of future court proceedings. AA at 94-101.
6
7 Upon the advice of counsel, Cooper did not testify at the hearing.
8

9 Prior to Judge Wilson making his determination about whether to revoke
10 Cooper's probation, he readdressed the Fifth Amendment issue. Specifically:
11

12 I want to go back to the Fifth Amendment issue for just a moment. I
13 indicated, I recognize and that's why we proceeded way out of order,
14 but I didn't state that the State also has an interest in proceeding
15 promptly. Mr. Thompson's testimony just makes that stronger in my
16 mind. He started his answer about if he was going to file new charges
and he said if the evidence supports them that he has more work to do.

17 And later he indicated that he does have evidence, he thinks there's
18 more evidence. The point is charges may be filed, when they're going
19 to be filed, there's no way to know. The criminal process if there is a
trial and all of that, it could be months, more than a year.

20 And so that's why the court has proceeded in spite of the Defendant's
21 Fifth Amendment quandary that she's in about testifying or not. But the
22 court does not hold against her that she didn't talk about the facts of the
23 case. She did make a statement and the court has considered that.

24 AA at 113:9-114:3. The Court found sufficient evidence to support the
25 violations of intoxicants, laws and travel and revoked Cooper's probation. AA at
26 114:4-115:6.
27

28 ///

IV. SUMMARY OF THE ARGUMENTS

The District Court should not have continued Cooper's Revocation Hearing based on charges that may or may not be filed in Elko that caused the Appellant to invoke her Fifth Amendment right and not testify at the hearing. The Court carefully acknowledged the quandary Cooper faced and used its discretion to proceed with the revocation hearing prior to the conclusion of possible charges in Elko. Specifically, the Court was concerned that an extensive period of time, possibly a year or more, could pass before criminal charges were refiled in Elko and the revocation would be postponed for an indefinite period of time. Moreover, *McGautha*, as adopted by the Ninth Circuit Court of Appeals, indicates that this decision does not impermissibly impair the policies behind the Fifth Amendment. *McGautha v. California*, 402 U.S. 183, 91 S. Ct. 1454 (1971).

V. ARGUMENTS

A. The District Court did not err in admitting testimony of laws violations at the revocation hearing because the decision to invoke the Fifth Amendment or testify in this case does not impermissibly impair the policies behind the Fifth Amendment.

"Parole and probation revocations are not criminal prosecutions; the full panoply of constitutional protections afforded a criminal defendant does not apply." *Gagnon v Scarpelli*, 411 U.S. 778 (1973); *Morrissey v Brewer*, 408 U.S. 471 (1972). "Due process requires, at a minimum, that a revocation be based upon 'verified facts' so that 'exercise of discretion' will be informed by an accurate

1 knowledge of the probationer's behavior." *Anaya v. State*, 96 Nev. 119 (1980)
2 citing *Morrissey*, 408 U.S. at 484.

3
4 The situation at hand can be likened to *McGautha*. In *McGautha*, the
5 defendant claimed that his Fifth Amendment privilege was impermissibly
6 burdened where a jury decided both guilt and punishment. *McGautha*, 402 U.S.
7 183. The argument in *McGautha* was that the Defendant was precluded from
8 testifying at sentencing because he opened himself up to cross examination as to
9 his guilt. *Id.* The court rejected that argument and indicated:
10
11

12 that the criminal system is replete with "situations requiring the making
13 of difficult judgments" as to which course to follow and that the
14 defendant may have a right of constitutional dimensions but the
15 Constitution does not forbid requiring the defendant to choose. The
16 question is whether compelling that decision impairs to an appreciable
17 extent any of the policies behind the rights involved.
18 *Id.* at 213.

19 The Ninth Circuit adopted this reasoning in *Yarbrough*. In *Yarbrough*, the
20 defendant chose not to testify at a criminal trial due to the possibility of other
21 charges in state court. *United States v. Yarbrough*, 852 F.2d 1522, 1529-1530 (9th
22 Cir.) (1988). Using the reasoning in *McGautha*, the *Yarbrough* court determined
23 that the defendant was presented with a similar difficult decision but that it did not
24 impermissibly impair the policies behind the Fifth Amendment because the
25 defendant could only speculatively point to future homicide prosecution. *Id.* at
26 1529.
27
28

1 The *Yarbrough* court also likened the case to *Nolan*, another Ninth Circuit
2 case. In *Nolan*, the defendant was faced with testifying in one case when he
3 concurrently faced prosecution in another case. *United States v. Nolan*, 700 F.2d
4 479 (9th Cir.), *cert. denied*, 462 U.S. 1123, 103 S. Ct. 3095 (1983). The *Nolan*
5 court also rejected the Fifth Amendment argument because the court said the
6 defendant was asking the court to “choose his strategic weapons without regards
7 to the needs of the judicial system.” *Id.* at 483.

8
9
10
11 *Bonin*, an additional case very similar to Cooper’s case, was heard by the
12 Ninth Circuit in 1995. In *Bonin*, the defendant had the choice to testify during the
13 penalty phase of a murder trial while pending additional murder charges in
14 another county. *Bonin v. Calderon*, 59 F.3d 815, 839 (9th Cir.) (1995). The
15 argument presented was that the defendant was given the choice to forgo his right
16 against self-incrimination or to forgo his right to defend himself and present
17 mitigating evidence. *Id.* at 840. Again, the Ninth Circuit rejects the argument and
18 further indicates that the rationale in *McGautha*, that a defendant can be forced to
19 choose between testifying in mitigation and remaining silent on the issue of guilt,
20 as it is supported by the Ninth Circuit and the Supreme Court. *Id. See Newton v.*
21 *Rumery*, 480 U.S. 386, 393-94, 107 S. Ct. 1187 (1987); *Corbitt v. New Jersey*, 439
22 U.S. 212, 218-19, 99 S. Ct. 492 (1978); *United States v. Yarbrough*, 852 F.2d
23
24
25
26
27
28

1 1522, 1529(9th Cir.) (*Yarbrough*), cert. denied, 488 U.S. 866, 109 S. Ct. 171
2 (1988).

3
4 In Cooper's case, a revocation hearing is held in Carson City while the
5 refiling of criminal charges was being considered in Elko based on the same facts
6 alleged in the violation. These charges, as referenced by Judge Wilson, could have
7 taken a year to come to fruition. This is analogous to *Yarbrough* in that the Cooper
8 can only point to the possibility of future prosecution. Additionally, as previously
9 stated, a revocation hearing is not a prosecution and the determination to revoke is
10 left to the discretion of the judge at a much lower standard than at trial.
11

12
13 As in *Bonin*, Cooper was faced with the decision to testify and provide
14 mitigating testimony or remain silent and invoke the Fifth Amendment. Cooper
15 made a strategic decision not to testify based upon the advice of counsel. The
16 policies behind the Fifth Amendment have not been impermissibly impaired.
17 Judge Wilson heard testimony, and recited this testimony as sufficient evidence in
18 his decision to revoke Cooper's probation.
19
20
21

22 **B. If the Court is disinclined to follow the rationale in *McGautha*, it**
23 **could develop an Evidentiary Rule as done in *Coleman***

24 The California Supreme Court adopted an Evidentiary Rule when presented
25 with this identical issue, the option to testify at the revocation hearing or to remain
26 silent due to pending charges. In *Coleman*, the California Supreme Court
27
28

1 determined that “upon timely objection the testimony of a probationer at a
2 probation revocation hearing held prior to the disposition of criminal charges
3 arising out of the alleged violation of the conditions of his probation, and any
4 evidence derived from such testimony, is inadmissible against the probationer
5 during subsequent proceedings.” *People v. Coleman*, 13 Cal.3d 867, 889 (1976).
6
7 The *Coleman* Court called this an exclusionary rule that allows the State to press
8 for revocation while a probationer is pending trial. *Id.*

9
10
11 Currently, Nevada has no specific exception to render testimony at a
12 revocation hearing inadmissible in a future prosecution relating to similar charges
13 as stated in a probation violation. Further, Nevada law does not allow use
14 immunity where testimony is otherwise compelled. *See State v. Tricas*, 128 Nev.
15 698, 290 P.3d 255 (2012). Based upon the current law, the Court properly
16 exercised its discretion in balancing the State’s interest in proceeding with the
17 revocation hearing, considering the unknown timeframe when formal criminal
18 charges might be refiled and/or resolved in Elko, against Cooper’s Fifth
19 Amendment rights.

20 21 22 23 **VI. CONCLUSION**

24
25 The policies behind the Fifth Amendment were not impermissibly burdened
26 and the State requests this Court to AFFIRM the decision to proceed with the
27 revocation hearing in Appellant’s case.
28

1 Dated: March 22, 2017.

2 JASON D. WOODBURY
3 Carson City District Attorney

4 By: /S/ Meredith N. Beresford
5 Deputy District Attorney
6 Nevada Bar No. 13308
7 885 East Musser Street, Suite #2030
8 Carson City, NV 89701
9 (775) 887-2072
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **VII. VERIFICATION AND CERTIFICATE OF COMPLIANCE**

2
3 1. I hereby certify that this Answering Brief complies with the
4 formatting requirements of NRAP 32(a)(7), the typeface requirements of NRAP
5 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:
6

7 [X] This Answering Brief has been prepared in a proportionally spaced type
8 face using Microsoft Word 2003 in 14 point Times New Roman font.
9

10 2. I further certify that this Answering Brief statement complies with
11 the page limitations stated in Rule 32(A)(7), because it is proportionally spaced,
12 has a typeface of 14 points or more, and it does not exceed 30 pages.
13

14 3. Finally, I recognize that pursuant to NRAP 3C I am responsible for
15 filing a timely Answering Brief and the Supreme Court of Nevada may sanction
16 an attorney for failing to file a timely Answering Brief, or failing to cooperate
17 fully with appellate counsel during the course of an appeal.
18

19
20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

1 I therefore certify that the information provided in the Respondent's
2 Answering Brief is true and complete to the best of my knowledge, information,
3 and belief.
4

5 Dated this 22nd day of March, 2017.

6 JASON D. WOODBURY
7 Carson City District Attorney

8 By: /S/ Meredith N. Beresford
9 Deputy District Attorney
10 Nevada Bar No. 13308
11 885 East Musser Street, Suite #2030
12 Carson City, NV 89701
13 (775) 887-2072
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

ADAM LAXALT
NEVADA ATTORNEY GENERAL

Sally Desoto
511 E. Robinson Street, Suite 1
Carson City, Nevada 89701
ATTORNEY FOR APPELLANT

Signed: /S/ Meredith N. Beresford
Deputy District Attorney
Nevada Bar No. 13308
885 East Musser Street, Suite #2030
Carson City, NV 89701
(775) 887-2072