

FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 APACH ICHIN, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

CRIMINAL CASE NO. 2017-1507

ORDER DENYING DISMISSAL OF PROBATION REVOCATION

Larry Wentworth  
Associate Justice

Decided: October 2, 2020

APPEARANCES:

For the Plaintiff: Mohammed Kutty, Jr., Esq.  
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For the Defendant: Bethwell O'Sonis, Esq.  
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#### HEADNOTES

##### Criminal Law and Procedure – Sentence – Probation – Revocation

The general principle is that once a probationary period has elapsed, the defendant has automatically satisfied the sentence imposed, but extended jurisdiction over a defendant is proper if the revocation process has been set in motion during the probationary period. FSM v. Ichin, 23 FSM R. 54, 58 (Chk. 2020).

##### Criminal Law and Procedure – Sentence – Probation – Revocation

When a warrant, summons, or order is executed, filed, and served, and the defendant is provided with notice of the revocation process, and the affidavit of violation is attached or adequately summarized therein, the FSM Criminal Rule 32.1 procedural notice requirements are fulfilled, and the court must set this process in motion before the probationary sentence's expiration, but this does not seem to accommodate the situation where the probation violation occurs, or comes to light, too near the probationary period's end for the court or a prosecutor to put the process in motion before the probation period ends or the situation where the defendant cannot be given notice of the proposed revocation before the probation period ends because the defendant cannot be found in time. FSM v. Ichin, 23 FSM R. 54, 58 (Chk. 2020).

##### Criminal Law and Procedure – Sentence – Probation – Revocation

The expiration, on June 7, 2020, of the probationary period of the defendant's June 8, 2018 sentence did not deprive the court of jurisdiction to revoke his probationary status because the revocation process was started while he was still subject to the probationary restraints of his June 8, 2018 sentence. FSM v. Ichin, 23 FSM R. 54, 58 (Chk. 2020).

##### Criminal Law and Procedure – Double Jeopardy; Criminal Law and Procedure – Sentence – Probation – Revocation

Double jeopardy is not implicated by probation revocation proceedings because those proceedings' function is not to punish a defendant for a new crime. Rather, their purpose is to ascertain an appropriate sentence for an offense of which the defendant has already been convicted. FSM v. Ichin, 23 FSM R. 54, 59 (Chk. 2020).

##### Criminal Law and Procedure – Double Jeopardy

Since the FSM constitutional protection against double jeopardy is patterned after a U.S. Bill of Rights provision, U.S. authority may be consulted to understand its meaning and scope. FSM v. Ichin, 23 FSM R. 54, 59 n.3 (Chk. 2020).

##### Criminal Law and Procedure – Double Jeopardy; Criminal Law and Procedure – Sentence – Probation – Revocation

There is no double jeopardy protection against revocation of probation and the imposition of imprisonment. This is true whether revocation is predicated on the probationer's conviction of a criminal offense or merely on a finding that he has abused the opportunity given him to avoid incarceration. FSM v. Ichin, 23 FSM R. 54, 59 (Chk. 2020).

##### Criminal Law and Procedure – Sentence – Probation – Revocation

All that is required for revocation of probation is that the court is satisfied that the probationer has

abused the opportunity given him to avoid incarceration by violating a condition of probation. Thus, any violation of a probation condition is an abuse of the opportunity to avoid incarceration regardless of whether that violation constitutes a crime and of whether, if it is a crime, it is prosecuted in a new case. FSM v. Ichin, 23 FSM R. 54, 59 (Chk. 2020).

Criminal Law and Procedure – Double Jeopardy; Criminal Law and Procedure – Sentence – Probation – Revocation

If probation is revoked for a new crime, subsequent prosecution and punishment for that crime does not violate the prohibition against double jeopardy, as upon revocation the punishment is assessed for the offense for which an accused was originally given probation. FSM v. Ichin, 23 FSM R. 54, 59 (Chk. 2020).

Criminal Law and Procedure – Double Jeopardy; Criminal Law and Procedure – Sentence – Probation – Revocation

When a defendant has been punished (found guilty and sentenced) for new crimes before the probation revocation proceedings are completed, this does not change the double jeopardy analysis, but this circumstance does mean that the defendant was afforded greater protections than if his probation had been revoked before he was convicted of the new crimes. That is because a defendant has greater rights during a trial than at a revocation hearing. FSM v. Ichin, 23 FSM R. 54, 59 (Chk. 2020).

Criminal Law and Procedure – Double Jeopardy; Criminal Law and Procedure – Sentence – Probation – Revocation

A probation revocation is generally not considered to be part of a criminal prosecution, so it is not a second occurrence of jeopardy. Probation revocation is not a stage of a criminal prosecution, but does result in a loss of liberty. FSM v. Ichin, 23 FSM R. 54, 59 n.4 (Chk. 2020).

Criminal Law and Procedure – Sentence – Probation – Revocation; Criminal Law and Procedure – Standard of Proof

To revoke probation, a court needs only to be reasonably satisfied that the probation violation occurred, while to find a defendant guilty of having committed a crime, a court must find proof beyond a reasonable doubt. "Reasonably satisfied" is a much lower standard of proof than "beyond a reasonable doubt." FSM v. Ichin, 23 FSM R. 54, 59 (Chk. 2020).

Criminal Law and Procedure – Sentence – Probation; Criminal Law and Procedure – Sentence – Probation – Revocation; Evidence – When Evidence Rules Apply

The FSM Rules of Evidence (other than with respect to privileges) do not apply to proceedings for granting or revoking probation, while the FSM Evidence Rules fully apply to criminal trials. FSM v. Ichin, 23 FSM R. 54, 59 (Chk. 2020).

Criminal Law and Procedure – Sentence – Probation – Revocation; Criminal Law and Procedure – Standard of Proof

A criminal conviction is sufficient to reasonably satisfy the trial court that the probationer has violated a condition of his probation that he obey all laws. When a revocation hearing occurs afterwards, a criminal conviction after trial at which the probationer was entitled to all the protections afforded a criminal defendant including formal rules of evidence, the right to assigned counsel if indigent, and the requirements that the government establish guilt beyond a reasonable doubt certainly affords a more than sufficient basis for revocation of probation. FSM v. Ichin, 23 FSM R. 54, 59-60 (Chk. 2020).

Criminal Law and Procedure – Sentence – Probation – Revocation

The practice of postponing revocation proceedings serves various purposes including: permitting the probationer to clear himself of the new criminal charges, thus, likely enabling him to avoid revocation of probation; avoiding the need to have the probationer testify at the revocation hearing as to matters that may

prejudice him in the criminal case; and avoiding hampering the probationer's ability to defend himself on the criminal charges, plus avoiding inconsistent findings in the probation proceedings and the criminal case. FSM v. Ichin, 23 FSM R. 54, 60 (Chk. 2020).

Criminal Law and Procedure – Sentence – Probation – Revocation

Because of the much lower standard of proof for a probation revocation, an acquittal at trial for the new crime might not prevent a later probation revocation for the same conduct. FSM v. Ichin, 23 FSM R. 54, 60 (Chk. 2020).

Criminal Law and Procedure – Double Jeopardy; Criminal Law and Procedure – Sentence – Probation – Revocation

Probation revocation proceedings conducted during, before, or after the prosecution for the new crime, on which the revocation proceedings are based, do not violate the probationer's constitutional protection against double jeopardy, and, if the new crime is tried before the revocation hearing occurs, the defendant is afforded greater protections that he might have otherwise had. FSM v. Ichin, 23 FSM R. 54, 60 (Chk. 2020).

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COURT'S OPINION

LARRY WENTWORTH, Associate Justice:

This comes before the court on Defendant Ichin's Motion to Dismiss Probation Revocation, filed September 15, 2020, and the Government's Response to Defendant Ichin's Motion to Dismiss Probation Revocation, filed September 21, 2020. The motion is denied. The court's reasoning follows.

I. BACKGROUND

A. *Procedural History*

On June 8, 2018, Apach Ichin was, on his plea of guilty, convicted of illegal possession of a handgun, 11 F.S.M.C. 1023(5), (with other counts dismissed), and sentenced to jail for two years, all suspended, with Apach Ichin placed on probation subject to conditions that included, among others, that he obey all laws to which he is subject, and that he not possess or use any firearms, ammunition, or explosive devices.

On January 8, 2020, the government filed its Motion to Revoke Suspended Sentence, in which it asked that the Apach Ichin's probation be revoked and that he be returned to jail because Ichin had violated his suspended sentence by committing the acts that the January 7, 2020 criminal information and affidavit in Criminal Case No. 2020-1500, charged him with committing. That information charged Apach Ichin with possessing a firearm while under the influence of alcohol, unlawful possession of a handgun, and the use of a firearm to commit the crime of shooting a person.<sup>1</sup> On September 2, 2020, Ichin was found guilty of those charges (and a witness tampering charge) after a trial on the superseding information. (He was sentenced on September 30, 2020.)

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<sup>1</sup> This information was later superseded by the information in Criminal Case No. 2020-1503, which added a later, but related, charge of witness tampering.

B. *Parties' Arguments*

Ichin contends that the government's motion to revoke probation should be dismissed because his probationary period expired on June 7, 2020, and because he has been found guilty of, in a separate prosecution,<sup>2</sup> charges based on the same conduct that is the basis for the prosecution's revocation motion. (He has now been sentenced in that case.) He further contends that to revoke his probation in this case would violate the constitutional protection against double jeopardy because, in his view, revocation of probation will punish him twice for the same conduct.

The government contends that, since it started the revocation proceedings well before Ichin's probationary period expired, the court may exercise extended jurisdiction over the matter, and it still has the authority to revoke Ichin's probation and impose a sentence of incarceration even though Ichin's probationary period has now ended. The government notes that, although the revocation proceedings were started in time, they were continued several times at either Ichin's behest or by joint motion. The government further contends that double jeopardy protections would not be violated by revocation of Ichin's probation because any probation revocation would be punishment for the 2017 crime that he was convicted of in this case, while the punishment in Criminal Case No. 2020-1503 was for the different crimes committed at a later (2019) time.

II. ANALYSIS

A. *Effect of Expiration of Probationary Period*

The general principle is that once a probationary period has elapsed, the defendant has automatically satisfied the sentence imposed, but extended jurisdiction over a defendant is proper if the revocation process has been set in motion during the probationary period. FSM v. Akapito, 20 FSM R. 579, 581 (Chk. 2016) (citing FSM v. Edward, 20 FSM R. 335, 338 (Pon. 2016)).

Under FSM v. Edward, 20 FSM R. 335, 340 (Pon. 2016), when a warrant, summons, or order is executed, filed, and served, and the defendant is provided with notice of the revocation process, and the affidavit of violation is attached or adequately summarized therein, the FSM Criminal Rule 32.1 procedural notice requirements are fulfilled, but the court must set this process in motion before the probationary sentence's expiration. This Edward requirement that the court must set this process in motion before the probationary sentence's end does not seem to accommodate the situation where the probation violation occurs, or comes to light, too near the probationary period's end for the court or a prosecutor to put the process in motion before the probation period ends or the situation where the defendant cannot be given notice of the proposed revocation before the probation period ends because the defendant cannot be found in time.

But, neither of those situations applies here. The January 8, 2020 motion to revoke was filed well before Ichin's probationary period was to end June 7, 2020. And the court's March 11, 2020 order setting the revocation hearing for April 17, 2020, moved the process further along well before the end of Ichin's probationary period.

Therefore, the expiration, on June 7, 2020, of the probationary period of Ichin's June 8, 2018 sentence did not deprive the court of jurisdiction to revoke his probationary status because the revocation process was started while Ichin was still subject to the probationary restraints of his June 8, 2018 sentence.

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<sup>2</sup> Criminal Case No. 2020-1503.

B. *Double Jeopardy and Probation Revocation*

Ichin further contends that the revocation of his probation in this case because of conduct for which he was found criminally liable after trial in another criminal case, Criminal Case No. 2020-1503, subjects him to multiple punishments for the same conduct, thus violating the constitutional protections against double jeopardy.

The court must reject this contention. That is because "double jeopardy is not implicated by probation revocation proceedings because the function of those proceedings is not to punish a defendant for a new crime. Rather, their purpose is to ascertain an appropriate sentence for an offense of which the defendant has already been convicted." *People v. Preuss*, 920 P.2d 859, 860 (Colo. Ct. App. 1995)).<sup>3</sup> "[T]here is no double jeopardy protection against revocation of probation and the imposition of imprisonment. This is true whether revocation is predicated on the probationer's conviction of a criminal offense or merely on a finding that he has abused the opportunity given him to avoid incarceration." *Commonwealth v. Odoardi*, 489 N.E.2d 674, 675 (Mass. 1986) (citation and internal quotations omitted). "All that is required for revocation of probation is that the court is satisfied that the probationer has abused the opportunity given him to avoid incarceration," *Roberson v. Connecticut*, 501 F.2d 305, 308 (2d Cir. 1974), by violating a condition of probation. Thus, any violation of a probation condition is an abuse of the opportunity to avoid incarceration regardless of whether that violation constitutes a crime and of whether, if it is a crime, it is prosecuted in a new case.

Thus, "[i]f probation is revoked for a new crime, subsequent prosecution and punishment for that crime does not violate the prohibition against double jeopardy, as upon revocation the punishment is assessed for the offense for which an accused was originally given probation." 6 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, *CRIMINAL PROCEDURE* § 26.10(d), at 899 (3d ed. 2007). In this case, Ichin has been punished (found guilty and sentenced) for the new crimes before the probation revocation proceedings were completed. This does not change the double jeopardy analysis, but this circumstance does mean Ichin was afforded greater protections than if his probation had been revoked before he was convicted of the new crimes. That is because a defendant has greater rights during a trial than at a revocation hearing.<sup>4</sup>

To revoke probation, a court needs only to be reasonably satisfied that the probation violation occurred, *Akapito*, 20 FSM R. at 581; *FSM v. William*, 16 FSM R. 4, 9 (Chk. 2008); *FSM v. Kintin*, 15 FSM R. 83, 86 (Chk. 2007); *FSM v. Phillip*, 5 FSM R. 298, 303 (Kos. 1992), while to find a defendant guilty of having committed a crime, a court must find proof beyond a reasonable doubt, *Kimoul v. FSM*, 5 FSM R. 53, 55 (App. 1991); *Ludwig v. FSM*, 2 FSM R. 27, 35 (App. 1985); *Andohn v. FSM*, 1 FSM R. 433, 441 (App. 1984); *Alaphonso v. FSM*, 1 FSM R. 209, 223 (App. 1982); *FSM v. Wainit*, 10 FSM R. 618, 621 (Chk. 2002). "Reasonably satisfied" is a much lower standard of proof than "beyond a reasonable doubt." And the FSM Rules of Evidence (other than with respect to privileges) do not apply to proceedings for granting or revoking probation, FSM Evid. R. 1101(d)(3), while the FSM Evidence Rules fully apply to criminal trials.

Thus, "a criminal conviction is sufficient . . . to reasonably satisfy the trial court that the probationer

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<sup>3</sup> Since the FSM constitutional protection against double jeopardy is patterned after a U.S. Bill of Rights provision, U.S. authority may be consulted to understand its meaning and scope. *Helgenberger v. U Mun. Court*, 18 FSM R. 274, 279 n.1 (Pon. 2012).

<sup>4</sup> A probation revocation is generally not considered to be part of a criminal prosecution, so it is not a second occurrence of jeopardy. "Probation revocation . . . is not a stage of a criminal prosecution, but does result in a loss of liberty." *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 93 S. Ct. 1756, 1759-60, 36 L. Ed. 2d 656, 661-62 (1973).

has violated a condition of his probation that he obey all laws." Hutchinson v. State, 438 A.2d 1335, 1337 (Md. 1982). When a revocation hearing occurs afterwards, "[a] criminal conviction after trial at which the probationer was entitled to all the protections afforded a criminal defendant including formal rules of evidence, the right to assigned counsel if indigent, and the requirements that the [government] establish guilt beyond a reasonable doubt certainly affords a more than sufficient basis for revocation of probation . . . ." Roberson, 501 F.2d at 308; Rubera v. Commonwealth, 355 N.E.2d 800, 804 (Mass. 1976).<sup>5</sup> Some authorities even suggest that for these reasons it might be preferable if the criminal prosecution occurs before the probation revocation proceeding. This is because

[t]he practice of postponing revocation proceedings is said to serve various purposes including: permitting the probationer to clear himself of the new criminal charges, thus, likely enabling him to avoid revocation of probation; avoiding the need to have the probationer testify at the revocation hearing as to matters that may prejudice him in the criminal case; and avoiding hampering the probationer's ability to defend himself on the criminal charges.

Odoardi, 489 N.E.2d at 678; *see also* United States v. Sackinger, 537 F. Supp. 1245, 1250 (W.D.N.Y. 1982)(citing the same reasons plus "avoiding inconsistent findings in the probation proceedings and the criminal case"); 6 LAFAVE, ISRAEL, KING & KERR, *supra*, § 26.10(c), at 890. The court notes, however, that because of the much lower standard of proof for a probation revocation, an acquittal at trial for the new crime might not prevent a later probation revocation for the same conduct.

Therefore, probation revocation proceedings conducted during, before, or after the prosecution for the new crime, on which the revocation proceedings are based, do not violate the probationer's constitutional protection against double jeopardy. In this case, since the new crime was tried before the revocation hearing will occur, Ichin was afforded greater protections that he might have otherwise had.

### III. CONCLUSION

Accordingly, Apach Ichin's motion to dismiss the probation revocation proceeding is denied.

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<sup>5</sup> Hawaii even requires that "where revocation of probation is based on the commission of another crime, the commission must be established by a conviction." State v. Palama, 612 P.2d 1168, 1172 (Haw. 1980) (purpose "is to preserve for the defendant all his procedural rights he is accorded in a formal criminal trial for his new charge which is the basis for his probation revocation"). The Hawaii requirement would not necessarily be workable here because the crime for which probation revocation is sought might be one that the FSM cannot prosecute since it falls within state or municipal jurisdiction (or conceivably a crime committed in a foreign country).