

SUPREME COURT OF KANSAS

State v. Gary, 282 Kan. 232

144 P.3d 634 (2006) · No. No. 93,089 · Decided October 27, 2006

SUMMARY

The Kansas Supreme Court held that a district court may not revoke probation based solely on criminal conduct committed before probation was granted because no probation conditions were in effect at that time. The court affirmed the Court of Appeals' reversal of the probation revocation and rejected the State's argument that the conduct constituted a probation violation. The court also discussed, but did not apply, the exception for affirmative misrepresentation or fraudulent concealment relied upon when probation is granted.

CASE DETAILS

COURT	Supreme Court of Kansas
WRITING FOR THE COURT	Davis, J.
JURISDICTION	Kansas
DECIDED	October 27, 2006
DOCKET	No. 93,089
DISPOSITION	affirmed
PROCEDURAL POSTURE	The State petitioned the Supreme Court of Kansas for review of the Court of Appeals' decision reversing the district court's revocation of Gary's probation.
STANDARD OF REVIEW	Unlimited de novo review because the issue was statutory interpretation and the legal authority of the district court to revoke probation. The court noted that an abuse-of-discretion standard does not insulate an error of law from appellate correction.
PRECEDENTIAL VALUE	Published precedential opinion of the Supreme Court of Kansas
PARTIES	Lorenzo C. Gary v. State of Kansas

TOPICS

- probation
- criminal procedure
- statutory interpretation
- appellate procedure
- standard of review

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether Kansas law permits a district court to revoke probation based on criminal conduct occurring before probation was granted.
2. Whether a defendant's failure to disclose a crime committed before sentencing constitutes fraudulent concealment or misrepresentation sufficient to support probation revocation.
3. Whether the district court had jurisdiction to revoke Gary's probation based on the pre-probation conduct.

HOLDINGS

1. A district court may not revoke probation based on criminal conduct that occurred before probation was granted because the conduct did not violate any term or condition of probation then in existence.
2. Gary's failure to disclose the pre-sentencing attempted robbery was not fraudulent concealment and could not support revocation because he had no independent affirmative obligation to incriminate himself at sentencing.
3. The district court acted beyond its jurisdiction when it revoked probation based solely on conduct occurring before probation was granted.

KEY QUOTATIONS

“Revocation can only occur if there is a violation of terms of probation.” (at 638)

“We hold that defendant did not have an independent, affirmative obligation to incriminate himself at sentencing by revealing his commission of the crime of attempted robbery 3 days prior to sentencing.” (at 646)

“The district court's revocation of his probation based upon what may be concealment by the defendant provided no basis for the revocation of his probation and amounted to an exercise of power beyond its jurisdiction.” (at 646)

FACTUAL BACKGROUND

Gary pleaded guilty to two forgery counts and was granted 18 months of probation on May 25, 2004. The attempted robbery underlying the alleged probation violation occurred on May 22, three days before probation was granted, although Gary was charged after sentencing. The district court revoked probation and imposed the original prison sentence based on that conduct. Gary had not made an affirmative misrepresentation about the attempted robbery at sentencing.

PROCEDURAL HISTORY

Gary pleaded guilty to two forgery counts and was granted probation on May 25, 2004. The district court later revoked probation based on an attempted robbery committed three days before probation was granted. The Court

of Appeals reversed, holding that the probation statutes did not authorize revocation for pre-probation conduct. The Kansas Supreme Court affirmed the Court of Appeals and reversed the district court.

DISPOSITION

affirmed

REMAND INSTRUCTIONS

The case was remanded for action consistent with the opinion; the Court of Appeals' reversal of the probation revocation was affirmed and the district court's revocation was reversed.

CASES CITED

- State v. Gary, 34 Kan. App. 2d 599, 121 P.3d 1000 (2005)
- State v. Moon, 15 Kan. App. 2d 4, 801 P.2d 59 (1990), rev. denied, 248 Kan. 998 (1991)
- State v. Sutherland, 248 Kan. 96, 804 P.2d 970 (1991)
- Williamson v. City of Hays, 275 Kan. 300, 64 P.3d 364 (2003)
- Babe Houser Motor Co. v. Tetreault, 270 Kan. 502, 14 P.3d 1149 (2000)
- State v. White, 279 Kan. 326, 109 P.3d 1199 (2005)
- Koon v. United States, 518 U.S. 81, 100 (1996)
- State v. Lumley, 267 Kan. 4, 977 P.2d 914 (1999)
- State v. Yura, 250 Kan. 198, 825 P.2d 523 (1992)
- Swope v. Musser, 223 Kan. 133, 573 P.2d 587 (1977)
- City of Norton v. Hurt, 275 Kan. 521, 66 P.3d 870 (2003)
- Hinton v. State, 462 So. 2d 583 (Fla. Dist. App. 1985)
- Demchak v. State, 351 So. 2d 1053 (Fla. Dist. App. 1977)
- Patuxent v. Hancock, 329 Md. 556, 620 A.2d 917 (1993)
- Smith v. State, 742 So. 2d 1146 (Miss. 1999)
- State v. Ballensky, 586 N.W.2d 163 (N.D. 1998)
- Bell v. State, 656 S.W.2d 502 (Tex. App. 1983)
- Bryce v. Commonwealth, 13 Va. App. 589, 414 S.E.2d 417 (1992)
- Wray v. State, 472 So. 2d 1119 (Ala. 1985)
- State v. Rojas, 280 Kan. 931, 127 P.3d 247 (2006)
- State v. Schroeder, 279 Kan. 104, 105 P.3d 1237 (2005)
- Andrews v. State, 11 Kan. App. 2d 322, 720 P.2d 227 (1986)
- State v. Dunham, 213 Kan. 469, 517 P.2d 150 (1972)
- State v. Lumley, 25 Kan. App. 2d 366, 963 P.2d 1238 (1998), aff'd, 267 Kan. 4, 977 P.2d 914 (1999)
- Trueblood Longknife v. United States, 381 F.2d 17 (9th Cir. 1967), cert. denied, 390 U.S. 926 (1968)
- United States v. Ecton, 454 F.2d 464 (9th Cir. 1972)

- United States v. Torrez-Flores, 624 F.2d 776 (7th Cir. 1980)
- Minnesota v. Murphy, 465 U.S. 420, 435 n.7 (1984)
- State v. Gleason, 154 Vt. 205, 576 A.2d 1246 (1990)

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