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SUMMARY
February 9, 2023

2023COA12

No. 20CA0090, *People v. Vigil* — Criminal Law — Sentencing — Probation — Revocation; Criminal Procedure — Postconviction Remedies; Constitutional Law — Fifth Amendment — Right Against Self-Incrimination

A division of the court of appeals holds as a matter of first impression that the State cannot revoke a defendant's probation based on a valid invocation of the Fifth Amendment privilege against self-incrimination where the conviction is final but the defendant's initial period for seeking postconviction relief has not run.

COLORADO COURT OF APPEALS **2023COA12**

Court of Appeals No. 20CA0090
Pueblo County District Court No. 12CR1410
Honorable William D. Alexander, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Robert Eulogio Vigil,

Defendant-Appellant.

ORDER REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE TOW
Navarro and Schutz, JJ., concur

Announced February 9, 2023

Philip J. Weiser, Attorney General, Joseph G. Michaels, Assistant Solicitor General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, John Plimpton, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant, Robert Eulogio Vigil, appeals the district court's order revoking his probation for refusing to sign his treatment contract, which contained certain acknowledgments that he believed amounted to self-incrimination. In resolving his appeal, we hold as a matter of first impression that the State cannot revoke a defendant's probation based on a valid invocation of the Fifth Amendment privilege against self-incrimination where the conviction is final but the defendant's initial period for seeking postconviction relief has not run. Because we conclude that Vigil validly invoked his privilege against self-incrimination and was pursuing timely postconviction relief, we reverse the order revoking probation and remand to the district court for further proceedings consistent with this opinion.

I. Background

¶ 2 Vigil was charged with two counts of sexual assault on a child by one in a position of trust based on allegations that he had twice sexually assaulted his daughter. After a jury trial, at which Vigil testified that he had never sexually assaulted his daughter, he was convicted as charged. The district court sentenced Vigil to two

consecutive terms of ten years to life of sex offender intensive supervision probation (SOISP).

¶ 3 Vigil directly appealed his judgment of conviction, and the judgment was affirmed. *See People v. Vigil*, (Colo. App. No. 15CA1711, Mar. 1, 2018) (not published pursuant to C.A.R. 35(e)), *cert. granted, judgment vacated in part, and case remanded*, (Colo. No. 18SC267, Sept. 4, 2018) (unpublished order), (Colo. App. No. 15CA1711, Dec. 20, 2018) (not published pursuant to C.A.R. 35(e)).[1] However, while Vigil's appeal was pending, the district court amended the probation conditions to exempt him from having to answer questions or submit to polygraph examinations concerning the underlying circumstances of his case.

¶ 4 Upon receipt of the mandate, the district court authorized the reinstatement of all original SOISP treatment conditions. One month later, the probation department filed a complaint to revoke Vigil's probation. The complaint, as subsequently amended, alleged

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[1] A division of this court issued two decisions in Vigil's direct appeal because the Colorado Supreme Court granted his petition for certiorari on a jury instruction issue and then vacated in part and remanded his case back to the division for reconsideration in light of *People v. Rediger*, 2018 CO 32.

that Vigil had violated the terms and conditions of his probation by (1) refusing to sign a contract with the sex offender treatment provider, thereby preventing him from enrolling in offense specific treatment; (2) being present at a Walmart three minutes after his curfew expired; and (3) failing to submit a safety plan, which would have authorized him to be at the Walmart when he was there.

¶ 5 At the revocation hearing, the district court heard testimony from Vigil's probation officers and the victim. One of the officers testified that the treatment contract Vigil refused to sign contained the following language:

> I understand that the primary purpose of treatment is to learn to control my deviant sexual behavior, as well as my deviant thinking patterns, and to further prevent victimization of others.
>
> To accomplish this, I understand that taking responsibility for my sexually offensive behavior is a primary issue to be addressed in treatment.
>
> I further understand that I can learn through the course of treatment, how to control my deviant sexual thoughts and behaviors.
>
> I understand that the staff of Surrender Counseling and Consulting, LLC deplores violence and sexually offensive behaviors and will not tolerate any form of violence or sexual

> victimization of anyone but [sic] me. *I understand that I am in treatment for victimizing others through sexually offensive behavior*. And I agree not to put myself in a risky situation.

(Emphasis added.)

¶ 6 The officer testified that the probation department's understanding was that, by signing this contract, Vigil would be stating that "he understood and took responsibility for the underlying offense" and was "in treatment for victimizing other people." Further, both officers testified that the treatment provider was unwilling to modify the terms of the contract or apply for a variance with the Sex Offender Management Board (SOMB) so that Vigil could attend sex offender treatment without admitting that he had victimized others through sexually offensive behavior. And the officers testified that the probation department was aware that Vigil was planning to file a motion for postconviction relief.

¶ 7 At the conclusion of the hearing, the district court found that Vigil had violated the terms and conditions of his probation by "not adequately complying with or participating in offense specific treatment," "violating curfew," and violating "the safety plan." Because Vigil's direct appeal was complete and because he had not

yet filed his Crim. P. 35(c) motion, the district court refused defense counsel's request to make a finding concerning whether Vigil retained a Fifth Amendment right and whether being required to sign the contract would violate that right.

¶ 8 Less than one month later, Vigil filed his Crim. P. 35(c) motion challenging his conviction.[2]

¶ 9 At his sentencing hearing, the district court resentenced Vigil to two new consecutive, indeterminate terms of at least ten years on SOISP. A new treatment provider agreed to request a variance from the SOMB so that Vigil could enter treatment and not be put in a position where he would need to invoke his Fifth Amendment privilege against self-incrimination while his Crim. P. 35(c) motion was pending.

II. Discussion

¶ 10 Vigil contends that the district court erred when it found that he violated the terms and conditions of his probation by refusing to sign the treatment contract, which contained incriminating language. Because at least one aspect of Vigil's refusal was a valid

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[2] The district court ultimately denied Vigil's postconviction challenge, and Vigil has appealed that order in a separate case.

exercise of his Fifth Amendment privilege against self-incrimination, we agree.

A. Mootness

¶ 11 Initially, we address the People's contention that Vigil's challenge is moot because he received the relief he requested — namely, that SOISP was reinstated with a variance safeguarding his Fifth Amendment privilege.

¶ 12 We review de novo the question of whether an appeal is moot. *See People ex rel. Rein v. Meagher*, 2020 CO 56, ¶ 14. "A case is moot when a judgment, if rendered, would have no practical legal effect on an existing controversy." *Warren v. People*, 192 P.3d 477, 478 (Colo. App. 2008).

¶ 13 Vigil was originally sentenced to SOISP for two consecutive terms of ten years to life on August 25, 2015. After the revocation, he was resentenced on November 26, 2019, to SOISP for two new consecutive terms of ten years to life. If Vigil were to prevail in this appeal, the revocation might be reversed,[3] and his two consecutive

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[3] We say "might be reversed" because the refusal to sign the contract was not the only technical violation the People established at the revocation hearing. We express no opinion as to whether the

probation sentences would revert to when they originally started, on August 25, 2015. Thus, prevailing on this appeal could offer Vigil the chance to complete his probationary sentence more than four years earlier than his current trajectory. Accordingly, we decline to treat this contention as moot. *See DePriest v. People*, 2021 CO 40, ¶ 8 ("[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." (quoting *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307-08 (2012))).

B. Ripeness

¶ 14 Alternatively, the People assert that Vigil's challenge is not ripe because he (1) did not assert his Fifth Amendment privilege against any incriminating question; (2) was not punished for a valid exercise of any Fifth Amendment privilege; and (3) had not yet filed a Crim. P. 35(c) motion at the time of the revocation.

¶ 15 Whether an issue is ripe for review is also a legal question that we review de novo. *Youngs v. Indus. Claim Appeals Off.*, 2012 COA 85M, ¶ 16. "A court lacks subject matter jurisdiction to decide an

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proven violations not related to Vigil's refusal to sign the contract are sufficient on their own to support revocation of his probation.

issue that is not ripe for adjudication." *DiCocco v. Nat'l Gen. Ins. Co.*, 140 P.3d 314, 316 (Colo. App. 2006). "Ripeness tests whether an issue is real, immediate, and fit for adjudication." *Zook v. El Paso County*, 2021 COA 72, ¶ 9. And we generally "refuse to consider uncertain or contingent future matters that suppose speculative injury that may never occur." *Bd. of Dirs., Metro Wastewater Reclamation Dist. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 105 P.3d 653, 656 (Colo. 2005).

¶ 16 Vigil asserted his Fifth Amendment privilege against being required to adopt specific statements contained in the treatment contract, at least one of which, as discussed below, was incriminatory. Vigil was punished for this assertion when his probation was revoked and reinstated for a new term with a substantially later starting date than the original term. And, as discussed below, while he had not yet filed a timely Crim. P. 35(c) motion, all parties were aware that he was in the process of doing so and — less than one month after the revocation and before his resentencing and this appeal — he did file such a motion. Therefore, we conclude that Vigil's challenge is ripe for review.

C. Standard of Review

¶ 17 We review de novo the application of the Fifth Amendment to undisputed facts in this case. *People v. Roberson*, 2016 CO 36, ¶ 20; *People v. Ruch*, 2016 CO 35, ¶ 19.

D. Analysis

¶ 18 The Fifth Amendment of the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. That right applies to both federal and state proceedings. *People v. Taylor*, 41 P.3d 681, 689 (Colo. 2002).

¶ 19 As our supreme court has observed,

> The Fifth Amendment not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also it "privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."

Roberson, ¶ 21 (citations omitted). It is a privilege that continues after a conviction and, therefore, it is retained even while the offender is on probation. *Id.* However, it is not an unlimited right

to refuse to answer any question; rather, it prohibits only compelled, incriminatory testimony. *Id.* at ¶ 22.

¶ 20 Testimony is incriminating not only when it would support a conviction but also when it would furnish a link in the chain of evidence needed to prosecute the accused. *Id.* at ¶ 23. Accordingly, when a defendant demonstrates a possibility of prosecution that is "more than fanciful," they have demonstrated a "reasonable fear of prosecution sufficient to meet constitutional muster." *Id.* (quoting *Steiner v. Minn. Life Ins. Co.*, 85 P.3d 135, 142-43 (Colo. 2004)); *see also Ruch*, ¶ 21.

¶ 21 Vigil refused to sign a treatment contract that contained statements acknowledging he was "in treatment for victimizing others through sexually offensive behavior." Vigil contends that such an admission would incriminate him because (1) though his direct appeal had concluded, he was actively pursuing a motion for postconviction relief; (2) the statements in the treatment contract were broad enough that they could have been used against him in a prosecution for new charges or in a retrial of the original charges if his convictions were set aside; (3) he testified at trial that he had not sexually assaulted the victim; and (4) the admissions he would

have made by signing the treatment contract could therefore be used to prosecute him for perjury.

¶ 22 Under the circumstances, we agree that the requirement that Vigil sign the agreement implicated his Fifth Amendment privilege. Because Vigil's initial period for seeking timely postconviction relief as set forth in section 16-5-402(1), C.R.S. 2022, had not expired, acknowledging that he was in treatment for victimizing others through sexually offensive behavior presented a possibility of prosecution that was "more than fanciful." *Roberson*, ¶ 23 (quoting *Steiner*, 85 P.3d at 142-43); *Ruch*, ¶ 21.[4] In particular, any statements that Vigil made would be available for use against him at a retrial on the original charges, in the event postconviction relief was granted. *See People v. Villa*, 671 P.2d 971, 973 (Colo. App. 1983) ("[W]hen a defendant is appealing his conviction, *or seeking other post-conviction relief*, the privilege continues in order to protect him from the subsequent use of self-incriminating statements in

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[4] Because we conclude that this statement was potentially incriminatory, we need not — and do not — decide whether the acknowledgments of his "deviant sexual behavior," "deviant thinking patterns," "sexually offensive behavior," or "deviant sexual thoughts and behaviors" similarly implicate his Fifth Amendment privilege.

the event relief is granted.”) (emphasis added); *accord Roberson*, ¶ 25 (citing *Villa* with approval and noting that because Roberson’s convictions were on appeal, “any statements that [he] made would have been available for use against him at a retrial”).

¶ 23 In *Roberson*, ¶¶ 24-25, our supreme court recognized that a probationer has a Fifth Amendment right to refuse to answer questions about a current offense while a direct appeal of that conviction is pending. Though no case in Colorado directly addresses whether a probationer retains these rights while the initial period for pursuing timely postconviction relief remains open, persuasive authority from other jurisdictions has done so.

¶ 24 In *James v. State*, 75 P.3d 1065, 1067 (Alaska Ct. App. 2003), the defendant’s probation was revoked when he failed to take responsibility for his sex-offense-related convictions while he had a pending application for postconviction relief. The court held that because he had an application for postconviction relief pending, he “face[d] a realistic threat of self-incrimination sufficient to justify the protections of the Fifth Amendment.” *Id.* at 1072.

¶ 25 In *State v. Imlay*, 813 P.2d 979, 982 (Mont. 1991), the defendant’s probation was revoked after he failed to complete a

sexual therapy program due to his refusal to admit to the underlying offense. The Supreme Court of Montana held that requiring the defendant to admit his guilt to avoid revocation of his probation violated his rights under the Fifth Amendment. *Id.* at 985. In so holding, the court pointed out that the defendant "still had the right to challenge his conviction, based on newly discovered evidence, or by collateral attack." *Id.*

¶ 26 Some state courts addressing this precise issue have come to the opposite conclusion. *E.g.*, *Roth v. Comm'r of Corr.*, 759 N.W.2d 224, 229 (Minn. Ct. App. 2008) (holding that "once a direct appeal has concluded and the risk of a perjury prosecution is absent or has expired, an offender no longer enjoys the Fifth Amendment privilege to refuse to participate in sex-offender treatment"); *cf. Mitchell v. United States*, 526 U.S. 314, 326 (1999) (observing, without discussing the possibility of collateral attacks, that no further incrimination can occur, and the privilege cannot be invoked, if "the sentence has been fixed and the judgment of conviction has become final").

¶ 27 However, under the circumstances, and absent any grant of immunity, we believe the better reasoned decisions are those that

protect a defendant's constitutional right against self-incrimination while the defendant's initial period for seeking timely postconviction relief has not run.[5]

¶ 28 Having concluded that the statements in the treatment contract called for Vigil to provide incriminating information, we next address whether such statements were compelled.

¶ 29 Testimony is compelled when the state threatens to inflict sanctions unless a defendant abandons their Fifth Amendment right or when a state imposes substantial penalties because a defendant has elected to exercise their Fifth Amendment right. *Minnesota v. Murphy*, 465 U.S. 420, 434 (1984). In *Roberson*, our supreme court held that threatening a defendant with revocation of their probation based on the proper invocation of their Fifth Amendment rights amounted to compulsion. *Roberson*, ¶ 49. Likewise, because the language in the treatment contract called for Vigil to provide at least one incriminating acknowledgment within the meaning of the Fifth Amendment as a precondition of being able to engage in treatment, or else face revocation of his probation for

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[5] We express no opinion on whether the privilege extends beyond the initial period for seeking timely postconviction relief.

failure to enter treatment, the required acknowledgment amounted to unconstitutional compulsion.

¶ 30 Therefore, the district court erred by revoking his probation on this basis.

¶ 31 In so holding, we reject the People's assertion that Vigil's invocation of his Fifth Amendment rights amounted to a blanket assertion of the privilege. In support of this argument, they cite to *Ruch*, where our supreme court held that there could be no Fifth Amendment violation where a defendant's probation was revoked based on a total refusal to attend treatment. *Ruch*, ¶ 4. But Vigil asserted his Fifth Amendment privilege only to the specific, incriminatory statements contained in the treatment contract. Unlike in *Ruch*, this assertion was not a blanket refusal to attend treatment but an invocation of the privilege against self-incrimination as it related to specific language in the treatment contract that would have inculpated Vigil had he signed it. That is, he did not outright refuse to enter treatment based on hypothetical or speculative concerns about what questions could be asked of him in treatment. *Id.* at ¶ 32. Therefore, *Ruch* is inapposite.

¶ 32 We further reject the People's contention that because Vigil had not yet filed his Crim. P. 35(c) motion at the time of the revocation, he had no privilege against self-incrimination. All parties were aware that Vigil was diligently pursuing a timely Crim. P. 35(c) motion. And it would be meaningless for us to conclude that a defendant could lose their right against self-incrimination in the brief period between the denial of their direct appeal and the timely initiation of postconviction proceedings, especially where, as here, the district court and probation were aware that the initiation of postconviction proceedings was imminent.

¶ 33 We also reject the People's argument that *Ruch* and *Roberson* should not apply to postconviction proceedings because once a defendant's direct appeal is concluded, their conviction is final, and given the decreased likelihood of success in postconviction proceedings, there is no longer a real and appreciable risk that incriminating statements made during treatment could be used against them.

¶ 34 The supreme court held in *Roberson* that the Fifth Amendment extends to "any possibility of prosecution which is more than fanciful." *Roberson*, ¶¶ 23-24 (quoting *Steiner*, 85 P.3d at 142-43).

Despite the finality that comes with the conclusion of a direct appeal, and notwithstanding the decreased likelihood of success in postconviction proceedings, there exists a possibility of prosecution that is more than fanciful because successful postconviction challenges, though certainly not frequent, are nevertheless not uncommon.

¶ 35 Regarding the People's community safety concern, we recognize that our holding today has the potential to allow some defendants who are seeking timely postconviction relief an opportunity to avoid certain aspects of treatment. However, the SOMB has recognized this predicament and outlined specific guidance for treatment providers to obtain a variance from the SOMB and continue treatment under these conditions. *See* SOMB, *Standards and Guidelines for the Assessment, Evaluation, Treatment and Behavioral Monitoring of Adult Sex Offenders* § 3.162 (rev. Apr. 2022), https://perma.cc/V4N9-A65Y (2022 SOMB Guidelines). Indeed, Vigil availed himself of a treatment provider willing to operate under a variance such that he can continue sex offender treatment without jeopardizing his Fifth Amendment rights.

¶ 36 We also recognize the danger that, given this almost inevitable conundrum, there may be a hesitancy to grant sexual offenders probation for fear that their denial, and concomitant refusal to sign such pre-treatment acknowledgments, will result in them being in the community but not in treatment. But nothing in our holding today prevents the prosecution from offering a defendant use immunity so that they can continue to receive the full panoply of sex offender treatment without fear that their statements could be used against them should their postconviction challenge result in a retrial. *See Ruch*, ¶ 17 ("[A]bsent a grant of use immunity, the state could not revoke a defendant's probation based on [their] invocation of the Fifth Amendment right against self-incrimination . . . ."); 2022 SOMB Guidelines § 3.162(2)(A) ("If a Use Immunity agreement has been offered by the prosecuting attorney, the *Standards and Guidelines* shall be followed as written."); 2022 SOMB Guidelines app. S ("Use Immunity Determination").[6]

[6] Indeed, given the frequency with which this issue arises, it may behoove the legislature to explore how best to balance the interests of community safety and an offender's treatment needs with the offender's right against self-incrimination.

¶ 37 Finally, we reject the People's argument that because the Fifth Amendment prevents compelled self-incriminating statements from being used against a defendant *at trial*, there can be no violation for simply obtaining incriminating statements through treatment, as the use or non-use of any such statements would be subject to litigation at any future trial. Our supreme court in *Roberson*, ¶¶ 50-55, already rejected this argument. It held that Roberson "did not need to wait until the government tried to use incriminating statements against him at a subsequent criminal trial to invoke his Fifth Amendment privilege." *Id.* at ¶ 55.

¶ 38 Accordingly, under the particular circumstances of this case, we conclude that the district court erred when it revoked Vigil's probation based on his refusal to sign a treatment contract containing incriminatory language.

E. Remand

¶ 39 Where one basis for revoking probation is set aside on appeal, but one or more bases remain, we remand for further consideration of revocation unless the record "clearly shows the [district] court would have reached the same result" even absent the improper basis for revocation. *People v. Loveall*, 231 P.3d 408, 416 (Colo.

2010) (quoting *State v. Ojeda*, 769 P.2d 1006, 1008 (Ariz. 1989)); *see also People v. Ruch*, 2013 COA 96, ¶ 65, *rev'd on other grounds*, 2016 CO 35, ¶ 4. Here, the record does not clearly show that the district court proceedings would have had the same outcome if the district court had correctly resolved the Fifth Amendment challenge. Therefore, we reverse the order revoking probation and remand for further findings from the district court as to whether revocation was appropriate based solely on the remaining violations.

III. Disposition

¶ 40 The order revoking probation is reversed, and the case is remanded for further proceedings consistent with this opinion.

JUDGE NAVARRO and JUDGE SCHUTZ concur.