

Alabama Rules of Criminal Procedure

Rule 27. Probation and probation revocation.

Rule 27.6. Revocation of probation.

(a) HEARING. A hearing to determine whether probation should be revoked shall be held before the sentencing court within a reasonable time after the probationer's initial appearance under Rule 27.5.

(b) PRESENCE; RIGHT TO COUNSEL. The probationer is entitled to be present at the hearing and to be represented by counsel. Counsel will be appointed to represent an indigent probationer upon request:

(1) If the probationer makes a colorable claim that the probationer has not committed the alleged violation of the conditions or regulations of probation or the instructions issued by the probation officer; or

(2) Even when the violation is a matter of public record or is uncontested, if there are substantial reasons that justify or mitigate the violation and that may make revocation inappropriate, and the reasons are complex or otherwise difficult to develop or present.

(c) ADMISSIONS BY THE PROBATIONER. Before accepting an admission by a probationer that the probationer has violated a condition or regulation of probation or an instruction issued by the probation officer, the court shall address the probationer personally and shall determine that the probationer understands the following:

(1) The nature of the violation to which an admission is offered;

(2) The right under section (b) to be represented by counsel;

(3) The right to testify and to present witnesses and other evidence on probationer's own behalf and to cross-examine adverse witnesses under subsection (d)(1); and

(4) That, if the alleged violation involves a criminal offense for which the probationer has not yet been tried, the probationer may still be tried for that offense, and although the probationer may not be required to testify, that any statement made by the probationer at the present proceeding may be used against the probationer at a subsequent proceeding or trial.

The court shall also determine that the probationer waives these rights, that the admission is voluntary and not the result of force, threats, coercion, or promises, and that there is a factual basis for the admission.

(d) NATURE OF THE HEARING.

(1) The judge must be reasonably satisfied from the evidence that a violation of the conditions or regulations of probation or the instructions occurred. Each party shall have the right to present evidence and the right to confront and to cross-examine adverse witnesses who appear and testify in person. The court may receive any reliable, relevant evidence not legally privileged, including hearsay.

(2) If the alleged violation involves a criminal offense for which the probationer has not yet been tried, the probationer shall be advised at the beginning of the revocation hearing that, regardless of the outcome of the revocation hearing, the probationer may still be held for that offense and that any statement made by the probationer at the hearing may be used against the probationer at a subsequent proceeding or trial.

(e) DISPOSITION. If the court finds that a violation of the conditions or regulations of probation or instructions occurred, it may revoke, modify, or continue probation. Probation shall not be revoked for violation of a condition or regulation if the probationer had not received a written copy of the condition or regulation.

(f) RECORD. The judge shall make a written statement or state for the record the evidence relied upon and the reasons for revoking probation.

Committee Comments

Rules 27.5 and 27.6 are intended to comply with *Armstrong v. State*, 294 Ala. 100, 312 So.2d 620 (1975), and *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).

Rules 27.5 and 27.6 together set up a two-hearing process specifically required by *Gagnon*. Rule 27.5 provides for an initial appearance before the judge who issued the warrant for the probationer's arrest, if the probationer is arrested pursuant to an arrest warrant, or, if the probationer is arrested without a warrant, before the original sentencing judge, if available, or before another judge or magistrate. Rule 27.6(a) then provides for the revocation hearing itself.

Rule 27.5(b) allows the probationer to waive a revocation hearing within carefully defined limits. While *Gagnon* is silent on whether the second hearing may be waived, *Armstrong* says that two hearings are not necessary if at the first hearing the probationer has received such sufficient notice of the charges against him and of the evidence of probation violation that the probationer can make an adequate defense. The rule as drafted complies with *Gagnon*.

Rule 27.6(b) provides for the probationer's right to counsel in all instances. The right to appointed counsel for indigents is more restricted. *Gagnon* applied a case-by-case due process approach. Certain minimal guidelines were set forth, and section (b) tracks the language of the *Gagnon* decision. The Alabama Supreme Court in *Armstrong* adopted this same language in a footnote.

The United States Supreme Court specifically left open the question whether a probationer who can afford to hire a lawyer has an absolute right to be represented by counsel. This rule specifically addresses the question, since the right to the presence of counsel covered by Rule 6.1(a) and Art. I, § 6, Alabama Constitution of 1901, is as broad as possible and would cover this situation.

Under Ala.Code 1975, § 15-22-54, probation cannot be revoked without a hearing. However, there is no Alabama statute which requires a formal trial, and the court is not bound by the strict rules of evidence.

Specific time limits are not imposed under this rule. The probationer may request either an acceleration or postponement of the hearing date, depending on the particular circumstances. However, it is contemplated that a hearing will be held as soon as feasible and that a probationer will not be subjected to lengthy or unwarranted confinement prior to hearing.

The procedure for accepting an admission applies at either the initial appearance or the revocation hearing. If there is no admission, the hearing is conducted pursuant to section (d).

The court which has legally placed a prisoner on probation has a vested right to revoke or to modify any condition or period of probation. *Reynolds v. State*, 28 Ala.App. 246, 181 So. 797 (1938). Section (d) is designed to prevent arbitrary actions by probation officers seeking the aid of the court in revoking probation and to ensure compliance by probationer with regulations or conditions of probation or instructions pursuant to Rules 27.1 and 27.2. Although probation revocation may follow any violation by the probationer of a condition of his probation, revocation followed by imprisonment is not the recommended disposition, unless:

(1) Confinement is necessary to protect the public from further criminal activity by the probationer; or

(2) The probationer is in need of correctional treatment which can most effectively be provided if he is confined; or

(3) It would unduly depreciate the seriousness of the violation if probation were not revoked.

Other intermediate steps which should be considered in every case as possible alternatives to revocation include:

(1) A review of the conditions, followed by changes where necessary or desirable;

(2) A formal or informal conference with the probationer to reemphasize the necessity of compliance with the conditions;

(3) A formal or informal warning that further violations could result in revocation.

Section (f) is included to give a reviewing court a basis for evaluating the revocation hearing and decision. Both *Gagnon*, supra, and *Armstrong*, supra, require that a written statement be made as to the evidence relied upon and the reasons for revoking probation. A written judgment entry would constitute a sufficient written statement.

See *Stout v. State*, 45 Ala.App. 262, 229 So.2d 37 (1969).