STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2014AP2977

STATE OF WISCONSIN EX REL.
ROCKIE L. DOUGLAS,

Petitioner-Appellant,

v.

BRIAN HAYES, ADMINISTRATOR, DIVISION OF HEARINGS AND APPEALS AND EDWARD F. WALL, SECRETARY, DEPTARTMENT OF CORRECTIONS, OFFICE OF LEGAL COUNSEL,

Respondents-Respondents.

ON APPEAL FROM A NOVEMBER 4, 2014, CIRCUIT COURT ORDER DENYING A PETITION FOR WRIT OF CERTIORARI, KENOSHA COUNTY CASE NO. 14-CV-705, THE HONORABLE DAVID BASTIANELLI, PRESIDING

RESPONDENT BRIAN HAYES'S BRIEF

BRAD D. SCHIMEL
Attorney General

DANIEL P. LENNINGTON
Assistant Attorney General
State Bar #1088694

Attorneys for Respondent Brian Hayes

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-8901
(608) 267-2223 (Fax)
lenningtondp@doj.state.wi.us

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STATEMENT OF ISSUES

Following a grant of immunity, the State may force a probationer to answer questions, even if those answers will be self-incriminating. Failure to answer such questions may result in the revocation of probation. After being implicated in a multi-state crime spree, Appellant Rockie Douglas's probation agent granted him immunity and then asked questions concerning his recent whereabouts. Douglas refused to answer any questions. Was the Division of Hearings and Appeals correct in revoking Douglas's probation?

The circuit court answered "yes."

ORAL ARGUMENT AND PUBLICATION

Publication is appropriate in this case. The fact situation presented by this case—the State revoking probation after a probationer refuses to answer questions concerning an alleged crime—is very likely to repeat. Probationers and probation agents alike would benefit from a published decision on this point: that probation may be revoked when a probationer fails to answer questions following a broad grant of immunity, like the one provided in this case.

The likelihood of repetition in this case is even greater since the specific grant of immunity was quoted from a common Department of Corrections ("DOC") form. The form provides, in part, "I have also been advised that none of this

information can be used against me in a criminal proceeding." (R. 6:25.) This Court has already published one case on a similar set of facts, but in that case, the probationer chose to talk and admitted criminal activity. *See State v. Brimer*, 2010 WI App 57, 324 Wis. 2d 408, 781 N.W.2d 726. This case presents a factual variation because Douglas refused to give a statement. Although the legal underpinnings are the same, it would be helpful to publish a case clarifying that the immunity provided by the DOC form applies in both sets of factual circumstances (*i.e.*, admitting criminal activity and refusing to discuss criminal allegations), and that revoking probation following such a grant of immunity is appropriate.

As to oral argument, the State does not oppose Douglas's request for oral argument, and likewise agrees that it may assist the Court in the resolution of this case.

SUPPLEMENTAL STATEMENT OF THE CASE

On April 5, 2007, Douglas was sentenced to seven years and six months probation following burglary convictions in two different cases. (R. 6:7-8.) Shortly after starting probation, Douglas signed a DOC form entitled, "Rules of Community Supervision." (R. 6:23.) These rules, which echo the community-supervision rules provided in Wis. Admin. Code § DOC 328.04(3), provide in part: "15. You shall provide true and correct information verbally and in writing, in response to inquiries by the agent." (R. 6:23.)

In December 2013, Douglas was wanted in both Illinois and Wisconsin for two robberies, two residential burglaries, and eluding police on several occasions. (R. 6:36, 41.) Douglas also allegedly fled law enforcement officers and collided with another vehicle, resulting in the death of an eleven-year-old boy. (R. 42.) Douglas was eventually apprehended on December 24, 2013, and taken into custody. (R. 6:42.)

On January 10, 2014, Probation Agent Shannon Kloss visited Douglas in jail to ask him about these allegations. (R. 6:25.) Before questioning, Agent Kloss completed a form with Douglas that explains, "I have also been advised that none of this information can be used against me in criminal proceedings." (R. 6:25.) In spite of this immunity, Douglas refused to answer any questions. (R. 6:25.)

Based on his refusal to answer questions (and other alleged probation violations), Agent Kloss filed a recommendation to revoke Douglas's probation with the Division of Hearings and Appeals. (R. 6:6.)

On March 12, 2014, Administrative Law Judge Kathleen Kalashian presided over Douglas's revocation hearing. (R. 6:50.) On the issue of Douglas's refusal to answer questions in jail, Agent Kloss testified that she told Douglas none of the information he offered could be used against him:

> [I] stressed that none of it can be used in a criminal proceeding. Then I asked if he would be willing to give a statement. It seemed like he wanted to, but he

> stated he promised his family that he would not give a statement until they got an attorney and he talked to his attorney. I said that was fine.

(R. 6:90.) Agent Kloss further testified:

> Q Did you tell him it was a violation not to give a statement?
>
> A Yes.
>
> Q Did you stress that nothing he said would be used against him criminally?
>
> A Right. I explained that it couldn't be used in criminal court.

(R. 6:91.)

ALJ Kalashian found Agent Kloss credible and that Douglas had in fact refused to give a statement. (R. 6:52.) ALJ Kalashian further found that Agent Kloss read the warnings atop the DOC form to Douglas and that she "stressed that nothing he told her could be used against him in criminal court." (R. 6:52.) In conclusion, the ALJ found that Douglas's refusal to discuss the "allegations that he engaged in numerous crimes" to be a violation of "Rule #15 to provide true and correct information both verbally and in writing to his agent in response to inquiries posed to him." (R. 6:52.) Based on this violation, ALJ Kalashian revoked Douglas's probation. (R. 6:52.)

Douglas appealed the decision to Brian Hayes, Administrator of the Division of Hearings and Appeals, who affirmed the decision on April 11, 2014. (R. 6:66-67.)

Douglas then sought a writ of certiorari from the Kenosha County Circuit Court. (R. 12.) The circuit court summed up the case as follows:

> Here, the ALJ found that the agent was a credible witness; she informed Douglas that his statement to her could not be used in the criminal proceedings, a failure to give a statement was a violation of his rules of supervision, and that he was also aware of rules of supervision, including #15, as evidenced by his signature on the same on June 11, 2007. The statements of his whereabouts could not have been used in court on the new charges and Douglas was not free to decide to violate the rules of community supervision by refusing to provide information on his whereabouts because he promised his family not to give a statement until he talked to an attorney.

(R. 12:4.) The circuit court then denied the motion for a writ of certiorari. (R. 12:4.)

This appeal followed.

ARGUMENT

I. Standard of Review.

This is a narrow review of a probation-revocation order. Douglas admits that this Court's review is limited to one area: whether the decision is in accordance with law. (Appellant's Br. 8); *see also State ex rel. Tate v. Schwarz*, 2002 WI 127, ¶ 15, 257 Wis. 2d 40, 654 N.W.2d 438. Whether the agency acted in accordance with law is reviewed *de novo*. *Id.* ¶ 16. On the issue of reviewing factual findings, that is not an issue since Douglas admits that he

does not contest any of the factual findings. (Appellant's Br. 8.)

II. The Division of Hearings and Appeals was correct to revoke Douglas's probation for failure to answer questions.

The Division of Hearings and Appeals correctly revoked Douglas's probation because he was granted immunity yet refused to respond to questions. That was proper under established legal principles. "The absolute obligation to keep one's probation agent informed of one's whereabouts and activities when requested is the very essence of the system of probation." *State v. Evans*, 77 Wis. 2d 225, 231, 252 N.W.2d 664 (1977). The supreme court has recognized that "a parolee's responsibility to answer his agent's questions or face possible revocation if he does not is a price society has a right to exact for the privilege of conditional liberty." *State ex rel. Struzik v. Dep't of Health & Soc. Servs.*, 77 Wis. 2d 216, 224, 252 N.W.2d 660 (1977).

In *State v. Evans*, the supreme court held that a probationer may be compelled to provide a statement, even if that statement is incriminating. 77 Wis. 2d at 235-36. Because a probationer still has a right against self-incrimination, *Schwarz*, 257 Wis. 2d 40, ¶ 51, the probationer must be granted an "immunity that renders the compelled testimony inadmissible against the witness in a

criminal prosecution." *Evans*, 77 Wis. 2d at 235. The court in *Evans* established the following rule:

> In order to guarantee the fifth amendment rights of a probationer or a parolee and at the same time to preserve the integrity of the probation system, we hold that upon timely objection in criminal proceedings, the testimony of a probationer or a parolee given in response to questions by a probation or parole agent or at a probation or parole revocation hearing, which questions are prompted by pending charges or accusations of particular criminal activity, . . . or any evidence derived from such testimony, is inadmissible . . . .

Id.

In a later case, *State v. Thompson*, the court of appeals explained that this *Evans* immunity automatically prevents "the state from making any evidentiary use whatever in [ ] criminal proceedings" of statements made to a probation officer. 142 Wis. 2d 821, 833, 419 N.W.2d 564 (Ct. App. 1987). A probationer is not required to answer questions "unless he was offered immunity as described in *Evans*." *State v. Spaeth*, 2012 WI 95, ¶ 56, 343 Wis. 2d 220, 819 N.W.2d 769. But if a probationer refuses to answer questions despite "a grant of immunity, his or her probation may be revoked on that basis." *State v. Peebles*, 2010 WI App 156, ¶ 19, 330 Wis. 2d 243, 792 N.W.2d 212.

In this case, the undisputed factual record indicates that Douglas was granted immunity. The form memorializing his conversation with Agent Kloss states: "I have also been advised that none of this information can be used against me in criminal proceedings." (R. 6:25.) Agent

Kloss later testified that she "stressed that none of it [his answers] can be used in a criminal proceeding." (R. 6:90.) Agent Kloss responded to further questions as follows:

> Q Did you stress that nothing he said would be used against him criminally?
>
> A Right. I explained that it couldn't be used in criminal court.

(R. 6:91.)

In response to this uncontroverted evidence, Douglas argues that this grant of immunity was not sufficiently detailed. In his brief, Douglas explains that there is a difference between "use and derivative use immunity" and states that "Douglas was not informed about derivative use immunity." (Appellant's Br. 13.)

No case holds that a probation officer must explain the details of derivative-use immunity to a probationer before questioning. To the contrary, cases establishing this immunity requirement suggest only general language:

- In *Evans*, the supreme court said that the probationer should have been "made aware that any statements he made could not be used against him in a subsequent criminal proceeding arising out of the same fact situation." 77 Wis. 2d at 236.

- In *State v. Sahs*, the supreme court reiterated that a probationer may be compelled to answer questions "if he is advised that his responses could not be used against him in a subsequent criminal proceeding

arising out of the same fact situation." 2013 WI 51, ¶ 101, 347 Wis. 2d 641, 832 N.W.2d 80 (internal quotations omitted).

- In *Peebles*, the court of appeals stated that "the probationer must first be granted immunity prohibiting the information's use in any criminal proceedings." 330 Wis. 2d 243, ¶ 16.

The exact immunity granted in Douglas's case was consistent with the language from these decisions: "I have also been advised that none of this information can be used against me in criminal proceedings." (R. 6:25.) No case describing the required grant of immunity suggests that a probation officer must explain derivative-use immunity, or anything other than the fact that the information supplied by the probationer cannot be used in future criminal proceedings.

Additionally, nothing in this case suggests that the DOC form or Agent Kloss's statements granted anything less than full immunity consistent with the Fifth Amendment. Douglas claims that the phrase "this information" only refers to the statements made. (Appellant's Br. 13.) But this is not a common-sense reading of the phrase. "This information" can apply both to the exact statements made as well as the information contained in the statements. If the probation officer's intent was otherwise, then she would have said "the *statements* you make cannot be used against you in future

criminal proceedings" not "this *information* [cannot be used]."[1]

Douglas seeks to impose a level of detail and exactitude upon probation agents that is not imposed upon police officers when dealing with similar rights. For example, *Miranda* warnings need not be conveyed by "talismanic incantation," *California v. Prysock*, 453 U.S. 355, 359 (1981); rather, an officer's statements must only be understood to mean that the suspect has the right to remain silent; that anything the suspect says can be used against him in a court of law; that the suspect has the right to have a lawyer present; and that if the suspect cannot afford an attorney, an attorney will be appointed for him. *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966).

No court holds that for a *Miranda* warning to be sufficient, the officer must convey the full details of the right to an attorney or right to remain silent. For example, the *Miranda* warning does not have to specifically indicate that a suspect in custody may invoke the right to an attorney before the interrogation, during the interrogation, and before

[1]Douglas also claims that "a criminal proceeding" is ambiguous and might only apply to a Wisconsin proceeding. Defendant cites no case holding that an *Evans* warning must describe all the different potential venues of criminal proceedings.

any subsequent interrogation.[2] Also, a *Miranda* warning is not required to indicate that "at any time prior to or during questioning, that [if the suspect] wishes to remain silent, the interrogation must cease." *Miranda*, 384 U.S. at 479 (indicating the procedure after the warning, not the specific words of the warning). But under Douglas's theory, the basic *Miranda* warning would be unconstitutionally defective because it fails to fully describe the right to an attorney and right to remain silent.

In Wisconsin, the court of appeals has actually decided a case involving the exact immunity provided by the DOC form. In *State v. Brimer*, the defendant was on probation when he was arrested for cocaine

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[2]*See, e.g., Grennier v. State*, 70 Wis. 2d 204, 213, 234 N.W.2d 316 (1975) (internal quotations omitted). This case holds that the following warning was sufficient:

> Before being asked any questions, you must understand your constitutional rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions, and have him present with you during questioning. We have no way of giving you a lawyer if you cannot afford one, but one may be appointed for you, if you wish, if and when you go to court. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time.

possession. 324 Wis. 2d 408. While in jail, his probation officer visited him and provided him with the "standard Department of Corrections form, which includes the direction: . . . I have also been advised that none of this information can be used against me in criminal proceedings." *Id.* ¶ 2 (internal quotations omitted). After receiving the immunity granted by the DOC form, the defendant admitted in writing to using and selling cocaine. *Id*. The defendant's probation was consequently revoked. *Id.*

On appeal, the defendant argued that "using this statement violated his Fifth Amendment privilege against self-incrimination." *Id.* ¶¶ 3-4. In affirming the revocation, the court of appeals explained that the State may "validly insist on answers to even incriminating questions . . . as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination." *Id.* ¶ 13 (internal quotation omitted). The court then concluded that the DOC form "immunized him against using the statement in criminal proceedings." *Id.* Therefore, according to the court, "there was no Fifth Amendment violation and Brimer's attorney was not deficient for failing to object to using the statement at the reconfinement hearing." *Id.*

In *Brimer*, the court of appeals has already decided that the DOC form provides the immunity required by the Fifth Amendment. Although the facts here are different (the *Brimer* defendant confessed, and in this case, Douglas did not), the principle is the same: the Fifth Amendment is not violated if a probationer is given the standard immunity as provided by the DOC form or the similar warnings given by Agent Kloss.

CONCLUSION

This Court should affirm the decision of the circuit court and hold that *Evans* is satisfied so long as the probationer is informed that the information provided cannot be used in criminal proceedings. Because the DOC form provides an accurate, albeit simplified, recitation of rights, it is sufficient to convey this immunity before questioning a probationer in custody. Agent Kloss's statements further bolster this grant of immunity.

Because Douglas was sufficiently immunized before Agent Kloss's questioning, and he failed to answer questions,

it was appropriate for the Division of Hearings and Appeals to revoke his probation.

Dated this _____ day of March, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

DANIEL P. LENNINGTON
Assistant Attorney General
State Bar #1088694

Attorneys for Respondent Brian Hayes

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-8901
(608) 267-2223 (Fax)
lenningtondp@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,881 words.

Dated this _____ day of March, 2015.

_____
DANIEL P. LENNINGTON
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this _____ day of March, 2015.

_____
DANIEL P. LENNINGTON
Assistant Attorney General