

VOLUME NO. 40

OPINION NO. 74

PROBATION - Possible dispositions at hearing to revoke
probation under Youth Court Act;

RIGHT TO COUNSEL - Effect of waiver by youth alleged to be youth in need of supervision and youth's parent;
YOUTH COURT ACT - Term of commitment of youth in need of supervision who violates probation;
YOUTH COURT ACT - Waiver of counsel by youth alleged to be youth in need of supervision and youth's parent;
YOUTH IN NEED OF SUPERVISION - Commitment for probation violation;
MONTANA CODE ANNOTATED - Sections 41-5-103(12)(b), 41-5-103(13), 41-5-511, 41-5-523(1), 41-5-533.

- HELD: 1. Section 41-5-511, MCA, does not preclude commitment of a youth to the Department of Institutions following revocation of probation for violating its terms where the youth and the youth's parent waived counsel at the adjudicatory hearing at which the youth was placed on probation as a youth in need of supervision but was represented by counsel during proceedings to revoke probation.
2. A youth adjudicated as a youth in need of supervision who violates probation cannot be committed to the Department of Institutions for more than six months, but such a youth may then be charged as a delinquent youth in an original proceeding with a possible result that the youth could be committed to the Department of Institutions for more than six months.

3 October 1984

Ronald W. Smith
Hill County Attorney
Hill County Courthouse
Havre MT 59501

Dear Mr. Smith:

You have requested my opinion on the following issues related to the Montana Youth Court Act:

1. When a youth, who has waived counsel at the adjudicatory hearing in which he was found to be a youth in need of supervision, violates the terms of his probation, does section 41-5-511, MCA,

preclude commitment of the youth to the Department of Institutions?

2. Can a youth be committed to the Department of Institutions for a period of more than six months following revocation of the youth's probation where the youth was adjudicated a youth in need of supervision for commission of status offenses and committed only status offenses in violating the terms of probation?

These issues arise from the following facts. A petition was filed in youth court charging a youth with the commission of two status offenses and alleging that the youth was a youth in need of supervision. At the hearing the youth and the youth's parent were advised of their right to counsel and both the youth and the youth's parent waived counsel. The youth admitted the offenses and the judge found the youth to be a youth in need of supervision and placed the youth on probation.

The terms of the youth's probation included the requirement that the youth follow the rules and regulations of the foster parents of any foster home in which the youth was placed and to be law abiding. Subsequently, a petition to revoke the youth's probation was filed in which it was alleged that the youth failed to follow the rules and regulations of the foster parents and that the youth was a runaway, both status offenses.

The youth and the youth's parent appeared with court-appointed counsel to respond to the petition to revoke the youth's probation. The youth admitted the violations of probation, and the probation officer recommended that the youth be committed to the Department of Institutions because the youth was a delinquent youth for having violated the terms of the probation.

Counsel for the youth objected to this recommendation on the grounds that the provisions of section 41-5-511, MCA, required the court to appoint counsel for the youth at the prior hearing on the petition alleging the youth to be a youth in need of supervision because commitment to a state correctional facility was a possible result of that proceeding, and that the court's failure to

appoint counsel at that time prevented the court from committing the youth for more than six months because of the probation violations. The youth's counsel also objected on the grounds that section 41-5-533, MCA, precludes commitment of a youth in need of supervision to a state correctional facility for more than six months because such a disposition could not have been made in the original case.

Section 41-5-511, MCA, outlines the right to counsel of a youth in youth court proceedings:

In all proceedings following the filing of a petition alleging a delinquent youth or youth in need of supervision, the youth and the parents or guardian of the youth shall be advised by the court or, in the absence of the court, by its representative that the youth may be represented by counsel at all stages of the proceedings. If counsel is not retained or if it appears that counsel will not be retained, counsel shall be appointed for the youth if the parents and the youth are unable to provide counsel unless the right to appointed counsel is waived by the youth and the parents or guardian. Neither the youth nor his parent or guardian may waive counsel after a petition has been filed if commitment to a state correctional facility or to the department of institutions for a period of more than 6 months may result from adjudication. [Emphasis added.]

The issue here is whether the facts are within the prohibition of the last sentence of section 41-5-511, MCA, that is, whether the waiver of counsel at the adjudicatory hearing declaring the youth to be in need of supervision prevented commitment of the youth for more than six months at a later hearing to revoke the youth's probation.

This section limits the requirement of counsel to those proceedings in which a youth is charged as a delinquent youth because commitment for more than six months is possible only as a result of such an adjudication. Since a youth alleged to be in need of supervision cannot be committed for more than six months, the requirement of counsel under section 41-5-511, MCA, does

not attach in this situation. It may be argued that a youth in need of supervision could be committed beyond a six-month period because of a probation violation, but this is not a foreseeable result at the time of adjudication as a youth in need of supervision and can only occur by a subsequent court order after notice and hearing.

Under the facts you describe, the requirement of counsel was not violated where counsel was waived at the adjudicatory hearing charging the youth as a youth in need of supervision as there was no possibility of commitment for more than six months at the hearing.

Concerning the second issue, section 41-5-103(13), MCA, defines a "youth in need of supervision" in pertinent part as "[a] youth who commits an offense prohibited by law which, if committed by an adult, would not constitute a criminal offense." Under section 41-5-523(1)(a), MCA, the youth court may place such a youth on probation. The definition of a delinquent youth includes a youth in need of supervision who violates a term of probation. § 41-5-103(12)(b), MCA. The Montana Supreme Court has found no constitutional infirmities in proceeding as a delinquent youth against a youth in need of supervision who violates probation. In the Matter of C.H., 41 St. Rptr. 997, ___ P.2d ___ (1984).

Under section 41-5-533(3), MCA, which outlines the procedure for revocation of a youth's probation, "[i]f a youth is found to have violated a term of his probation, the youth court may make any judgment of disposition that could have been made in the original case." Therefore, a youth adjudicated as a youth in need of supervision who violates probation cannot be committed for more than six months because such disposition was unavailable in the original adjudication. However, a youth originally charged as a delinquent youth who is placed on probation as a youth in need of supervision (as provided in section 41-5-103(13)(d), MCA) may be committed for more than six months if adjudged a delinquent youth after violating probation.

Case law in this area varies, and does not resolve the matter. In In re Dowell, 193 S.E.2d 302 (N.C. 1972), the court found commitment of a youth proper where both the original offense and the probation violation were

truancy, because the statutory definition of delinquency included any child who violates a condition of probation. In State v. Doe, 619 P.2d 194 (N.M. 1980), however, the court held the commitment of a youth was not authorized under a probation revocation statute similar to that in Montana's Youth Court Act because commitment was not an available remedy in the original disposition.

This ambiguity may be resolved by reading together section 41-5-533, MCA, and the definition sections of the Youth Court Act. Section 41-5-533(1), MCA, provides that a delinquent youth or a youth in need of supervision who violates the terms of probation "may be proceeded against in a probation revocation proceeding." The use of the word "may" rather than "shall" indicates that this is not the exclusive method for dealing with such a youth. As an alternative to a revocation proceeding, under the definition of a delinquent youth, § 41-5-103(12)(b), MCA, a youth in need of supervision who violates probation could be charged by petition as a delinquent youth and could then be committed for a period of more than six months.

Here, the youth was proceeded against in a probation revocation proceeding. Therefore, the youth could not have been declared a delinquent youth and could not have been committed for a period of more than six months because neither the adjudication as a delinquent youth nor the disposition of commitment for more than six months was possible in the original case. Had the youth been proceeded against in an original proceeding as a delinquent youth, the youth could have been committed for more than six months.

THEREFORE, IT IS MY OPINION:

1. Section 41-5-511, MCA, does not preclude commitment of a youth to the Department of Institutions following revocation of probation for violating its terms where the youth and the youth's parent waived counsel at the adjudicatory hearing at which the youth was placed on probation as a youth in need of supervision but was represented by counsel during proceedings to revoke probation.

2. A youth adjudicated a youth in need of supervision who violates probation cannot be committed to the Department of Institutions for more than six months, but such a youth may then be charged as a delinquent youth in an original proceeding with a possible result that the youth could be committed to the Department of Institutions for more than six months.

Very truly yours,

MIKE GREELY
Attorney General