

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2015
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MICHAEL C. FLEMING,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Southern District of Texas
USDC No. CR-H-91-55-1
- - - - -

August 17, 1993

Before JOLLY, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:*

Michael C. Fleming appeals the judgment of the district court revoking his probation. He argues that the district court violated his right to due process by refusing to require the Government to produce testimonial and documentary evidence to support the allegation that he had violated probation by committing a new offense. Implicitly, he argues that the district court erred in revoking his probation.

The district court has broad discretion in a revocation of probation. Neither evidence to establish guilt beyond a

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

reasonable doubt nor substantial evidence is required, "absent arbitrary and capricious action in the revocation." United States v. Francischine, 512 F.2d 827, 829 (5th Cir.), cert. denied, 423 U.S. 931 (1975). We will not disturb the district court's action without a clear showing of abuse of discretion. Id. "The revocation of probation implicates a probationer's fundamental liberty interest and hence entitles him to procedural due process." United States v. Holland, 850 F.2d 1048, 1050 (5th Cir. 1988). A "probationer who admits the allegations against him must still be given an opportunity to offer mitigating evidence suggesting that the violation does not warrant revocation." Id.

At the revocation hearing, Fleming introduced a transcript of the state court proceedings and admitted that he had pleaded guilty to the felony offense of robbery. However, he argued that the conviction did not warrant revocation because he had not committed the offense. Fleming asserted that he entered an Alford** plea because he faced being charged as a habitual offender and remaining "in jail longer than if he accepted a much more favorable plea from the state." He argued that the factual basis for the state conviction was insufficient and that the Government had to prove the allegation by some independent evidence.

The district court found that the transcript was sufficient to show that Fleming had violated the conditions of his

** North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

probation. The district court also found Fleming's position that he did not commit the offense incredulous. The district court stated that Alford did not stand for the proposition that a defendant could lie in state court then go into federal court on a probation violation and expect the federal court to retry the state court conviction.

There is no showing that Fleming was denied his procedural due process rights. He admitted that he had been convicted of a state charge, and he was permitted "an opportunity to offer mitigating evidence suggesting that the violation [did] not warrant revocation." Holland, 850 F.2d at 1051. The district court did not abuse its discretion in revoking probation.

AFFIRMED.