

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Circuit Court
The Honorable Frank R. Addy, Jr.

Appellate Case No. 2021-001465

RECEIVED

DEC 22 2022

SC Court of Appeals

STATE OF SOUTH CAROLINAAPPELLANT

v.

Joey Reid, #1392728,RESPONDENT

FINAL BRIEF OF APPELLANT

**Matthew C. Buchanan
General Counsel**

**South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 207
Columbia, South Carolina 29202
(803) 734-9220**

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Can a circuit court judge vacate a sentencing order issued by another circuit judge when there was no appeal taken from the original sentence?
2. Should a sentence that was not appealed by either party become the law of the case even though it was not permitted by statute?

STATEMENT OF THE CASE

On January 27, 2014, Respondent pleaded guilty to one count of assault and battery in the first degree (2012-GS-24-1323) and one count of attempted murder (2012-GS-24-1325). (R.p.52-p.53). At the plea, he was represented by Carson Henderson, Esquire. Solicitor David Stumbo represented the State, and the Honorable Doyet Early, III, presided. Per the sentencing sheets and recollection of the solicitor, the plea was negotiated and agreed to by all parties. The negotiated plea was for Respondent to serve ten years in the Department of Corrections on the assault charge, plus a consecutive twenty-year sentence for attempted murder, suspended upon the service of five years' probation. This was accepted by the court, which followed the negotiation and imposed the agreed upon sentence. No appeal or post-conviction action was submitted by either party involved with the plea.

Respondent served his active sentence and was released to probation from the Department of Corrections on or about June 29, 2018 and began his term of probation with the South Carolina Department of Probation, Parole and Pardon Services (SCDPPPS). He was subsequently arrested for attempted murder on July 11, 2019. Agents for SCDPPPS issued a warrant for violation of probation on July 12, 2019, citing the allegations underlying the new arrest along with failing to pay monetary obligations and failing to follow the advice and instructions of the agent. A hearing on the probation violation was scheduled on January 30, 2020, before the Honorable Donald B. Hocker but the matter was continued. Ultimately, the probation violation hearing was not conducted until after Respondent was acquitted after trial by a jury of the attempted murder charge on April 21, 2021.

The violation of probation hearing was finally heard on October 28, 2021 before the Honorable Frank R. Addy, Jr. At an earlier hearing in which the matter was continued,

Respondent's counsel, Tristan Shaffer, raised an objection to the probation violation based on the underlying conviction and sentence – that a conviction for attempted murder could not be suspended to probation, regardless of the fact that it was a negotiated plea. See S.C. Code Ann. § 16-3-29 (2010) (“A sentence imposed pursuant to this section may not be suspended nor may probation be granted.”).

During the October hearing, Judge Addy considered Respondent's argument and heard from Eighth Circuit Solicitor David Stumbo and Assistant General Counsel for SCDPPPS Octavia Wright. (R.p. 1-p. 24). Judge Addy took the matter under advisement. On November 9, 2021, an unlocked placeholder order dismissing probation warrant W-24-20-0153 was issued, though the court stated it would supplement the order at a later time. (R.p.37). SCDPPPS responded in an email to all parties of its intention to file an appeal of the order when it is issued in its final form. (R.p.38-p.51). On November 29, 2021, Judge Addy issued a subsequent order dismissing probation violation warrants W-24-20-0116 and -153, and instructing Respondent to be released from the Greenwood County Jail. (R.p.36). In response to the dismissal Appellant filed a Notice of Appeal on December 9, 2021, and served Respondent.

In the intervening months between Respondent's attempted murder charge, his subsequent acquittal, and the October 28, 2021 hearing, Respondent had been indicted with other charges, including: pointing and presenting firearms (21-GS-24-02030); giving false information to law enforcement (2020A2420300197); obstructing justice (21-GS-24-02256); unlawful neglect of a child (21-GS-24-02126); and domestic violence in the second degree (21-GS-24-02125). He pleaded guilty on December 14, 2021 to a negotiated plea of five years on the unlawful neglect and domestic violence charges, with the other two charges dismissed. Mr. Shaffer represented Respondent during this plea before Judge Addy.

On December 31, 2021, Judge Addy issued an “Order Concerning Probation Violation,” remanding Indictment 2012-GS-24-1325 (attempted murder) for a new sentencing. (R.p.26-p.35). Appellant renewed its previously served and filed notice of appeal on January 11, 2022.

This brief follows.

Standard of Review

An appellate court will not disturb the Circuit Court's decision to revoke probation unless the decision was influenced by an error of law, was without evidentiary support, or constituted an abuse of discretion. State v. Archie, 322 S.C. 135, 470 S.E.2d 380 (Ct.App.1996); *see also* State v. White, 218 S.C. 130, 135, 61 S.E.2d 754 (1950) (stating that upon review of revocation of probation, question is not one of formal procedure respecting either notice, specifications of charges or trial thereon, but is simply whether trial court abused its discretion; review therefore must be determined in accordance with principles governing exercise of judicial discretion). The decision to revoke probation is addressed to the discretion of the circuit judge. White, 218 S.C. at 134–35, 61 S.E.2d at 756; State v. Proctor, 345 S.C. 299, 546 S.E.2d 673 (Ct.App.2001); State v. Hamilton, 333 S.C. 642, 511 S.E.2d 94 (Ct.App.1999). A reviewing court will only reverse this determination when it is based on an error of law or a lack of supporting evidence renders it arbitrary or capricious. Proctor, 345 S.C. at 301, 546 S.E.2d at 674. The court has much discretionary authority in dealing with guilty persons who are in a probationary status. Shannon v. Young, 272 S.C. 61, 248 S.E.2d 914 (1978).

Arguments

1. **A circuit court judge may not vacate a sentencing order issued by another circuit judge when there was no appeal taken from the original sentence.**

The law of South Carolina is well-settled that one circuit court judge may not reverse an order of another circuit court judge. Cook v. Taylor, 272 S.C. 536, 538, 252 S.E.2d 923, 924 (1979). While Appellant appreciates Judge Addy's thoughtful and thorough discourse on the matter that was before him, it respectfully submits that he overstepped his authority by vacating Respondent's sentence.

2. **A sentence that was not appealed by either party becomes the law of the case, even though it was not permitted by statute.**

Respondent entered into a negotiated plea where he derived a significant benefit. He agreed to a suspended sentence and a term of probation in lieu of an active sentence on the indictment at issue. Judge Early accepted the negotiated plea and sentenced him according to the negotiations. Although the sentencing court lacked the authority to suspend the sentence for attempted murder and to place Respondent on probation for that offense, at no point – until facing a revocation of that probation – did either the State or Respondent appeal or object to the sentence.

South Carolina law states that a ruling that is not objected to becomes the law of the case. See, State v. Lee, 350 S.C. 125, 132-33, 564 S.E.2d 372, 376 (Ct.App. 2002), citing State v. Sampson, 317 S.C. 423, 545 S.E.2d 721 (1995). Quite simply, because the judge suspended the sentence and placed Respondent on probation and neither side objected, Respondent was subject to the rules and requirements – and consequences for violating same – of probation.

SCDPPPS's duties are to execute the sentence by supervising Respondent and enforcing the conditions of probation. Its duties also involve bringing allegations of violations of the conditions to a circuit court judge, which has the authority to revoke all or part of the suspended sentence. "[R]evocation is the means to enforce the conditions of probation." Hamilton, 333 S.C. at 648, 511 S.E.2d at 97. See also: S.C. Code Ann. § 24-21-410 (2010), S.C. Code Ann. § 24-21-450 (1991), and S.C. Code Ann. § 24-21-460 (1976).

Consequently, Appellant submits that the trial court was fully within its authority to proceed with the violation hearing, consider the facts presented and exercise its discretion in determining the appropriate response – which includes a revocation up to the full suspended sentence. An appellate court "will not disturb the Circuit Court's decision to revoke probation unless the decision was influenced by an error of law, was without evidentiary support, or constituted an abuse of discretion." Lee at 129, 564 S.E.2d at 374, citing State v. Archie, 322 S.C. 135, 470 S.E.2d 380 (Ct.App. 1996).

In his objection to the probation revocation hearing, Respondent cites to dicta within Lee that suggests the matter of an illegal sentence may be raised at a probation violation hearing. "[T]he statutory authority of the sentencing court to issue the underlying sentence could have been challenged in a motion to reconsider the sentence, on direct appeal, or as a defense to the probation revocation proceedings." Id. at 132-133, 564 S.E.2d at 376.

Appellant submits that this current dilemma suggests that the court in Lee did not foresee how problematic such an objection can be. As the trial court acknowledged, SCDPPPS is not in a position to consider the validity of a probationary sentence. Its duties are to enforce the conditions

of probation pursuant to its statutory authority. Therefore, a violation of probation hearing should not be considered an appropriate time to submit an objection to the legality of the sentence.¹

The trial court also considered Justice (then Judge) Few's dissent in State v. Blakney, 410 S.C. 244, 254, 763 S.E.2d 622, 628 (2014). In Blakney, the sentencing judge suspended part of the mandatory fifteen-year minimum sentence for first degree burglary. The underlying issue in that case involved the duration of community supervision, though Justice Few's dissent is instructive here. "I would hold the State may not argue to a sentencing court that the court has the power to suspend a sentence, and after the court accepts the State's argument and suspends the sentence, turn around and argue, as it has done in this appeal, the sentence may not be suspended."

In light of Justice Few's objection, Appellant submits Respondent has done something similar – argue to the sentencing court that he should receive probation, and then when faced with a violation of that probation, argue that he never should have been on probation in the first place.

Furthermore, Justice Few's dissent notes that the State was not aggrieved by the error; Blakney was. Id. at 258, 763 S.E.2d at 630. Yet in this matter, the roles are reversed – Appellant is now trying to enforce a sentence that Respondent claims cannot be enforced, leaving the State's end of the bargain empty.

Testimony by Solicitor Stumbo indicates the original plea negotiations between the defense and prosecution failed to recall the statutory prohibition of probation for attempted murder. As the trial court points out, the sentence could very easily have been accomplished with a plea to assault and battery of a high and aggravated nature (ABHAN) – it carries up to twenty years, adds a strike,

¹ A possible exception to this would be to address a sentence truly detrimental to the defendant. For example, a suspension of ten years to probation for the crime of third degree burglary is not permitted because third degree burglary carries a maximum of five years. That improper sentence could be raised at a violation hearing so that the judge only considers a revocation of five years or less.

and can be suspended to probation. Therefore, the oversight does not appear to be through the operation of bad faith by the State. The plea negotiations resulted in both sides getting what they wanted – at least until Respondent failed to comply with the terms of probation and was about to face the consequences.

The reality that a simple change to the offense to which Respondent pled would have solved the issue also addresses another of the trial court’s misgivings – that of the enforceability of the negotiated plea bargain. While the trial court correctly acknowledges that a court is without power to enforce an illegal contract, the negotiated plea does not reflect an impossibility or an unthinkable sentence under the totality of the circumstances. While extreme examples such as ordering the death penalty for shoplifting were raised by the trial court,² nothing so extreme actually took place. The Respondent did not agree to an unconscionable sentence far exceeding his crime; he instead received a far *lessened* sentence than contemplated by statute.³ Furthermore, it is a bargain that could have been accomplished by reducing the offense to that of ABHAN.

Conclusion

While the Appellant understands the dilemma before the trial court, South Carolina law is clear that one circuit court judge cannot set aside another circuit judge’s order or sentence.

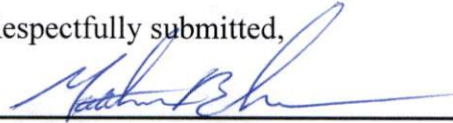
Furthermore, while the appellate courts *do* have the authority to reverse and remand an order or sentence from a lower tribunal, the rules strictly state that notice of appeal must be raised within ten days of the order. Rule 203(b)(2), SCACR. Clearly, this was not done, so the sentence

² Transcript, P. 17, l. 23 – P. 18, l. 4.

³ A far more apt analogy would be the enforceability of a judge handing down a sentence of three years for armed robbery instead of the mandatory minimum of ten years if the sentence was not appealed by either side.

imposed became the law of the case. Therefore, the violation court could only address the matter that lay before it – the violation(s) of probation alleged.⁴

Respectfully submitted,



Matthew C. Buchanan
General Counsel

South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 207
Columbia, South Carolina 29202
(803) 734-9220

Columbia, South Carolina
December 20, 2022

⁴ SCDPPPS’s recommendation for revocation was for ten years. In the underlying order, Judge Addy stated that “a recommended revocation of this magnitude is unusual for the violations alleged. The Court is inclined to believe and does find that the impetus for the initial ten (10) year partial revocation recommendation stems from the attempted murder charges for which Mr. Reid was acquitted on April 21, 2021.” Order Concerning Probation Violation, J. Addy, December 31, 2021, FN 6. This comment, however, fails to take into consideration the fact that Respondent had also pled guilty to domestic violence and unlawful neglect of a child – the convictions of which are wholly separate violations of probation that the court may yet address. Furthermore, the order fails to take into consideration that the acquittal of Respondent’s second attempted murder charge in no way precludes the violation court from considering evidence from the attempted murder charge that could show the Respondent violated one or more conditions of probation by a preponderance of the evidence. See State v. Williamson, 356 S.C. 507, 589 S.E2d 787 (Ct. App. 2003).

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Appellant filed December 20, 2022, complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, 407 S.C. 607, 607, 757 S.E.2d 421 (2014) (requiring redaction of social security numbers, names of minor children, financial account numbers, home addresses, and date of birth).

This 20th day of December 20, 2022.



Matthew C. Buchanan
General Counsel
S.C. Bar No. 73740