STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Hon. Alison R. Lee, Circuit Court Judge

Case No. 2011-CP-40-07689

The State, **Appellant,**

v.

Alexander G. Nutt, **Respondent.**

FINAL BRIEF OF RESPONDENT

John A. O'Leary, Esquire
O'Leary Associates, P.A.
714 Calhoun Street
Columbia, SC 29201
Telephone: (803) 779-5556
Facsimile: (803) 252-7515
Email: oleary_email@yahoo.com

Attorney for Respondent

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Hon. Alison R. Lee, Circuit Court Judge

Case No. 2011-CP-40-07689

The State, Appellant,

v.

Alexander G. Nutt, Respondent.

FINAL BRIEF OF RESPONDENT

John A. O'Leary, Esquire
O'Leary Associates, P.A.
714 Calhoun Street
Columbia, SC 29201
Telephone: (803) 779-5556
Facsimile: (803) 252-7515
Email: oleary_email@yahoo.com

Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

ARGUMENT

I. THE CIRCUIT COURT ERRED IN AFFIRMING THE MAGISTRATE COURT'S DECISION THAT RULE 6 OF THE SOUTH CAROLINA RULES OF CRIMINAL PROCEDURE DOES NOT APPLY TO CONDITIONAL DISCHARGE.

The courts below held that Rule 6, SCRCrimP, is inapplicable to a hearing on a Rule to Show Cause to determine if a defendant is in contempt for violating the terms of his conditional discharge. The circuit court stated that

> Rule 6, SCRCrimP applies to pre-trial matters, and a Rule to Show Cause hearing is 'fundamentally different form a criminal trial and other pre-sentencing proceedings.' *State v. Hill*, 368 S.C. 649, 658, 630 S.E.2d 274, 279 (2006). The violation of a conditional discharge, like a probation revocation, occurs after the imposition of a criminal sentence.

(J. 102.) This ruling is erroneous.

Section 44-53-450 of the South Carolina Code provides for conditional discharge in certain circumstances and states, in part, as follows:

> (A) Whenever any person who has not previously been convicted of any offense under this article or any offense under any state or federal statute relating to marijuana, or stimulant, depressant, or hallucinogenic drugs, pleads guilty to or is found guilty of possession of a controlled substance under Section 44-53-370(c) and (d), or Section 44-53-375(A), the court, *without entering a judgment of guilt* and with the consent of the accused, *may defer further proceedings* and place him on probation upon terms and conditions as it requires, including the requirement that such person cooperate in a treatment and rehabilitation program of a state-supported facility or a facility approved by the commission, if available. *Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided.*

S.C. Code Ann. § 44-53-450(A) (emphasis added). Thus, unlike a probation revocation hearing, an adjudication of guilt and imposition of sentence is entered only after

revocation of conditional discharge. Therefore, revocation of conditional discharge is different in nature from revocation of probation, and the lower court's rationale for holding that Rule 6 is not applicable to this proceeding is incorrect.

While the South Carolina Supreme Court has held that Rule 5, SCRCrimP, is not applicable to probation revocation proceedings, *State v. Hill*, 368 S.C. 649, 630 S.E.2d 274 (2006), the appellate courts have not addressed whether Rule 6 is applicable to such proceedings. Moreover, the courts have not addressed whether the Rules of Criminal Procedure apply to revocation of conditional discharge or to a contempt proceeding in a conditional discharge context. As discussed above, a proceeding for revocation of conditional discharge is different in kind from a proceeding for revocation of probation, where guilt and sentence have already been adjudicated.

Rule 37 states that the Rules of Criminal Procedure "shall apply to every trial court of criminal jurisdiction within the State" and that they "shall apply insofar as practicable in magistrate's courts, municipal courts, and family courts to the extent they are not inconsistent with the statutes and rules governing those courts." Rule 37, SCRCrimP. Accordingly, Rule 6 should be held applicable in this proceeding. *See State v. Hemmes*, 2007- ND 161, ¶¶ 11-12, 740 N.W.2d 81, 85 (probation revocation proceedings constituted "criminal proceedings" within meaning of Rules of Criminal Procedure, which are applicable to "criminal proceedings"; thus, North Dakota Rule of Criminal Procedure 16 applied to probation revocation proceeding since it was not specifically excepted form the authority of the Rules).

Therefore, the circuit court erred in affirming the magistrate court's decision that Rule 6 was not applicable in the proceedings below.

II. THE CIRCUIT COURT CORRECTLY REVERSED THE MAGISTRATE COURT RULING THAT THE RESPONDENT VIOLATED THE TERMS OF HIS CONDITIONAL DISCHARGE.

The State contends that the circuit court erred in reversing the magistrate on the sufficiency of the evidence to support the revocation of probation on the ground that such issue was not properly preserved, because Respondent failed to object to the sufficiency of the evidence but only argued that the State failed to comply with Rule 6. In the alternative, the State argues that the evidence was sufficient at the magistrate hearing.

A. The Issue Of The Sufficiency Of The Evidence Was Preserved For Appeal.

At the brief hearing on November 3, 2011 before the magistrate, Respondent essentially argued that because the only evidence of the conditional discharge violation was a one-page report stating that Respondent had tested positive for marijuana and that the report was unsigned, such report was insufficient to support revocation. (ROA 15) Respondent also argued that Rule 6 applied but was not complied with. (ROA 15-16)

Following the magistrate's ruling revoking conditional discharge, Respondent appealed. In his brief to the circuit court, although Respondent emphasized the failure of the report to comply with the requirements of Rule 6, such argument was made in the

larger context, as was argued at the hearing before the magistrate, that because the report was unsigned, there was no way in which the accuracy or reliability of the report could be shown and, thus, it was insufficient to support revocation even if Rule 6 did not apply.

At the hearing before the circuit court held on November 1, 2012, Respondent's counsel argued that "it was improper for the judge to find [a] violation based on an unsigned letter *and* based upon the fact that a Rule 6—they were on notice of a Rule 6. And for those reasons, I would ask that the case be reversed and dismissed." (ROA 16) The following exchange took place between Respondent's counsel and the court:

> THE COURT: Okay. So that's what you're objecting to, is the report is not signed. So you don't know who within the Midlands Exams and Drug Screening, Incorporated, performed the test?
>
> MR. O'LEARY: I have no idea, Judge. And the other problem that I had was the Judge, I think if you look at the transcript there, he basically said that we could have brought them in. I can't bring them in when we don't even know who it is.
>
> And I think it's reversible for a judge to accept an unsigned document and then find a person guilty of that, *not only for the Rule 6 but the fact that the document on its face would be invalid or inadmissible.*

(ROA 16 (emphasis added).)

Subsequently, the following exchange took place between the State's attorney and the court:

> THE COURT: And so at best this would be one of those situations in which it would be similar to a probationary matter in which someone would be accused of violating their probation. And in this case, it would be violating the terms of the conditional discharge. And they would be entitled to a hearing on that issue, right?

MR. SHENKAR: Yes, Your Honor.

THE COURT: Now, does that mean that they would—is there not an opportunity to challenge any drug test results that come about as a result of submitting a sample? I understand that the samples are required.

They're required to submit the sample. So it's not a question of whether their rights have been violated with respect to taking the sample. The question is, are they entitled to some type of due process as it relates to the testing of the sample and who would come and provide testimony as to its results and how it was tested?

MR. SHENKAR: Your Honor, I believe that that will satisfy their rule to show cause. It was after the conditional discharge was entered into. He was given 67 days before he took the drug test. He failed it.

And then, from my understanding, there was a rule to show cause based on the failure, at which point Mr. O'Leary challenged the admissibility of the drug testing based on the fact that it was not compliant with Rule 6. Obviously, we argue that Rule 6 doesn't apply to this situation because this is a post-conviction situation, not a pre-trial matter.

THE COURT: So your argument is that even absent Rule 6 that it is sufficient—that Mr. O'Leary or his client does not have the right to challenge and inquire of the person who collected the sample and tested the sample, that that's not a right that he has?

MR. SHENKAR: Well, I believe that Rule 6 doesn't apply here. Therefore, whatever Rule 6 stipulates with regards to a requirement for a drug test would not apply in this situation. He obviously has a right to challenge it if they believe that it's simply some kind of erroneous.

I do not know how that would work out. But I believe Mr. O'Leary's appeal today comes from the fact that the drug test itself that was taken and was returned to the Court did not bear the signature of the analyst or the chemist and was not accompanied by an affidavit, just like what we would receive when we request a drug analysis from SLED on matters that are pending in General Session in a pre-trial situation.

(ROA 24)

Respondent's counsel disagreed, stating:

> MR. O'LEARY: Judge, I don't necessarily agree with his analogy it's post-conviction. But in any event, let's assume it was, say it's a probation kind of comparison. You can't cross-examine a sheet of paper when there's nobody there to talk to. So I think I do have a right to confront the chemist in that case.
>
> In spite of my argument of the Rule 6, I know, I'm absolutely positive, that we would have a right. But even if you take that away, if they want to introduce the document, they've got to go through certain processes. And if we're there to challenge it, I could not challenge this document.

(ROA 25)

As the foregoing discussion between counsel and the court shows, Respondent clearly raised the issue of the sufficiency of the evidence to support the revocation of the conditional discharge, as well as the issue of whether Rule 6 applied to such revocation proceeding. Thus, the issue of the sufficiency of the evidence was properly preserved for appellate review.

B. The Evidence Was Insufficient At The Magistrate Hearing.

The determination of whether or not to revoke probation is within the trial court's discretion. *State v. Pauling*, 371 S.C. 435, 639 S.E.2d 680 (2006). Before revoking probation, the circuit judge must determine if there is sufficient evidence to establish that the probationer has violated his probation conditions. *Id.* A probationer facing revocation must be afforded minimal due process. *Id.* The court of appeals 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, 472 S.E.2d 380 (Ct. App. 1996).

In this case, if Rule 6 applied to this proceeding, then the unsigned report submitted by the State was inadmissible and the evidence was insufficient. Moreover, even if Rule 6 was not applicable, the unsigned report was not sufficient to establish that Respondent violated the conditions of his conditional discharge. As stated above, at least minimal due process must be afforded to Respondent in the hearing to determine whether he violated the conditions of his conditional discharge. Such due process requires that evidence admitted at the hearing must be reliable. *See, e.g., Toricellas v. Davison*, 519 F. Supp. 2d 1040 (C.D. Cal. 2007).

In this case, the circuit court correctly found that the unsigned report submitted by the State at the hearing was not reliable where it was not supported by any testimony or sworn document. Cases from other jurisdictions support this finding. *See In re Carson*, 789 S.W.2d 495 (Mo. Ct. App. 1990) (unsigned laboratory report indicating cocaine had been detected in the prisoner's urine lacked sufficient indicia of reliability and was insufficient under Due Process Clause to support revocation of probation); *Powell v. Commonwealth, Bd. of Prob. & Parole*, 513 A.2d 439 (Pa. Commw. Ct. 1986) (to admit laboratory drug screen report without witness confrontation in parole revocation proceeding, report had to contain indicia of regularity and reliability; in case before court, report did not have such indicia where report was unsigned); *Mitchell v. State*, 607 So. 2d

486 (Fla. Dist. Ct. App. 1992) (although hearsay testimony admissible at hearing, revocation of probation may not be based solely upon hearsay).

Accordingly, the circuit court correctly reversed the magistrate and correctly ruled that the evidence was insufficient to establish that Respondent violated the terms of his conditional discharge. Therefore, the circuit court's holding should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Order of the Circuit Court be affirmed.

Respectfully submitted,

John A. O'Leary, Esquire
O'Leary Associates, P.A.
714 Calhoun Street
Columbia, SC 29201
Telephone: (803) 779-5556
Facsimile: (803) 252-7515
Email: oleary_email@yahoo.com
Attorney for Respondent

July 18, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Hon. Alison R. Lee, Circuit Court Judge

Case No. 2011-CP-40-07689

The State, **Appellant,**

v.

Alexander G. Nutt, **Respondent.**

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

John A. O'Leary, Esquire
O'Leary Associates, P.A.
714 Calhoun Street
Columbia, SC 29201
Telephone: (803) 779-5556
Facsimile: (803) 252-7515
Email: oleary_email@yahoo.com

Attorney for Respondent

July 18, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Hon. Alison R. Lee, Circuit Court Judge

Case No. 2011-CP-40-07689

The State, **Appellant,**

v.

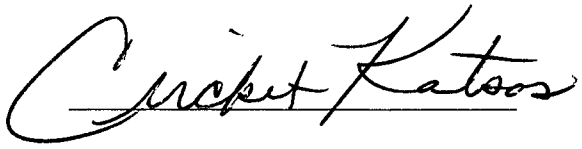
Alexander G. Nutt, **Respondent.**

CERTIFICATE OF SERVICE

I, the undersigned employee of O'Leary Associates, P.A., attorneys for Alexander G. Nutt, certify that I have served the foregoing document(s) on the individual(s) listed below on June 21, 2013 by placing a copy of the same in the United States Mail, postage prepaid, and return address clearly affixed to the following address:

PERSON SERVED: **Joseph Y. Shenkar**
Richland Solicitor's Office
1701 Main Street
Columbia, SC 29201

DOCUMENTS: **FINAL BRIEF OF RESPONDENT**



Columbia, South Carolina
July 18, 2013