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July 25, 2013

Honorable V. Claire Allen
Deputy Clerk of Court
S.C. Carolina Court of Appeals
1015 Sumter Street
P.O. Box 11629
Columbia, S.C. 29211

Re: Chrisley, Regan Berkley v. The State
Appellate Case No. 2013-000696

Dear Deputy Clerk Allen:

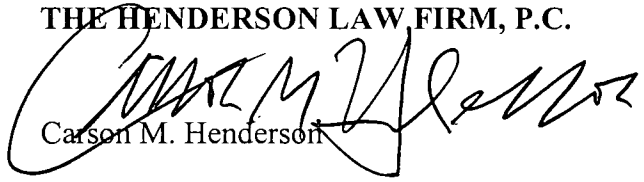
Enclosed please find for filing the Transcript of Record from the hearing before the Honorable Frank R. Addy, Jr., on February 19, 2013, along with a Proof of Service to all appellate counsel of record.

My email address is carson@carsonhendersonlawfirm.com.

Thank you for your assistance and cooperation in this matter.

Cordially yours,

THE HENDERSON LAW FIRM, P.C.


Carson M. Henderson

CMH/lhc
enclosures as indicated

RECEIVED
JUL 30 2013
SC Court of Appeals

cc: Salley W. Elliott, Esquire
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211-1549
(Attorney for the Respondent)

John A. O'Leary, Esquire
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714 Calhoun Street
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(Attorney for the Appellant)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Presiding Circuit Judge – Greenwood County

Appellate Case No. 2013-000696

REGAN BERKLEY CHRISLEY,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PROOF OF SERVICE

I certify that I have served the Transcript of Record on the Respondent, State of South Carolina, by depositing a copy of it in the United States Mail, postage prepaid, on July 25, 2013, addressed to its attorney of record, Salley W. Elliott, Office of the Attorney General, P.O. Box 11549, Columbia, S.C. 29211-1549, with a copy also being mailed to John A. O'Leary, Esquire, O'Leary Associates, PA, 714 Calhoun Street, Columbia, S.C. 29201.

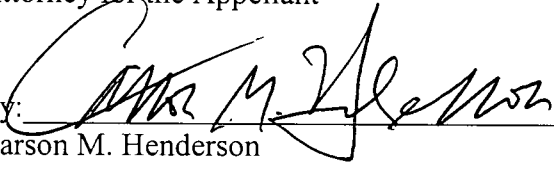
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JUL 30 2013

SC Court of Appeals

#1

THE HENDERSON LAW FIRM, P.C.
Attorney for the Appellant

By:  _____

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Greenwood, South Carolina

July 25, 2013

#2

State of South Carolina)
) Court of Common Pleas
County of Greenwood) 2012-CP-24-1485

State of South Carolina)
) Transcript of Record
))
Regan Berkley Chrisley)
) DEFENDANT

February 19, 2013
Greenwood, South Carolina

B E F O R E:

Honorable Frank R. Addy, Jr., Judge

A P P E A R A N C E S:

Demetri Andrews, Assistant Solicitor
Attorney for the State

Carson Henderson, Esq.
Attorney for the Defendant

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JUL 30 2013

SC Court of Appeals

Joy E. Holston
Official Court Reporter

1 THE COURT: We are back on the record and we have Mr.
2 Henderson present representing Ms. Chrisley. Mr. Andrews
3 was kind enough to join us to represent the State today.
4 This is the second time I believe this matter has been
5 appealed. It is essentially a conditional discharge. The
6 Court previously reversed, it looks like an evidentiary
7 hearing was held in front of the Magistrate or a hearing
8 was held of some kind in front of the Magistrate in
9 December. And at that point I think Mr. Henderson,
10 according to the transcript, requested an evidentiary
11 hearing and this all stems from Ms. Chrisley's failure of
12 a drug test that was administered on May the 14th and
13 apparently the Court proceeded to find Ms. Chrisley, Mr.
14 Chrisley, Ms. Chrisley?

15 MR. HENDERSON: Mr.

16 THE COURT: Mr. Chrisley, sorry, the name threw me,
17 fined Mr. Chrisley and this appeal resulted. So let me
18 hear from you, Mr. Henderson, I think you are the moving
19 party.

20 MR. HENDERSON: Thank you, Your Honor. You are
21 right, the Court had reversed this the first time on lack
22 of notice and then knowing all of the Magistrate Court's
23 backlog I hadn't any sooner gotten back to my office and I
24 got notice of a second hearing, Your Honor, by mail. So
25 went in there that day, took Mr. Chrisley with me and I

1 thought it was kind of odd that we are the only two people
2 in there and then the Judge is there and his recording
3 secretary is there. So, Your Honor, immediately the Judge
4 wants to talk about what he thinks may or may not have
5 happened here. And I request an evidentiary hearing.
6 And, Your Honor, obviously the Court just denies my
7 request and does not conduct an evidentiary hearing. And,
8 Your Honor, there was no hearing whatsoever. The
9 Government was not there, no evidence was presented
10 against my client, no testimony was presented against my
11 client. The Judge had a copy of a document in his hand
12 that he says I am sure you have which I did not have,
13 still do not have, a document that was not produced,
14 entered into evidence whatsoever. He says, look at this,
15 I think he failed a drug test. So, Your Honor, reading
16 the transcript I am very adamant that I requested an
17 evidentiary hearing which means that the Government has
18 got to put forth evidence, valid evidence, competent
19 evidence in the record in order to establish that my
20 client may have failed a drug test. And so, you know, I
21 timely objected to the entire proceeding, Your Honor. And
22 if you look I have attached a bunch of case law here that
23 under 44-53-450, conditional discharge, it is a form of
24 probation. I mean it is just kind of the drug court
25 probation but it is a form of probation. And if you look

1 and then I put Moore versus Moore, it is in the Family
2 Court context but talks about that when the Government in
3 the civil context, which probation is, it is kind of a
4 civil context within the criminal justice system that the
5 Government has got to put forth evidence that you have a
6 right to cross-examine. You have got to be able to see
7 your witnesses, none of that happened here other than
8 Judge Johnson waiving a little piece of paper around
9 saying I think you flunked the drug test. Your Honor,
10 then if you keep looking through--

11 THE COURT: Let me just sort of stop you there
12 because we are dealing with kind of two different things.
13 If you are using the probation analogy under current South
14 Carolina law you are entitled certainly to a hearing, you
15 are entitled to some minimum level of due process before
16 probation is revoked. But it is not a full-blown
17 evidentiary hearing in the sense that the agent is subject
18 to cross-examination, that they are questioned, that their
19 file then becomes subject to discovery, quite the contrary
20 according to South Carolina law. The file of the
21 probation department is actually confidential and would
22 not be subject to that level of discovery. At a
23 probationary hearing the primary question is whether there
24 has been a willful violation of that probation. And the
25 Court has a great deal of latitude as far as what it can

1 consider and what sort of report the probation department
2 can make to the Court absent a full-blown evidentiary
3 hearing. The Court can determine in that context, based
4 on simply the assertions of the probation agent that a
5 willful violation has taken place despite the
6 protestations of the person on probation. So likening
7 those two situations it seems to me that perhaps, I see
8 the transcript and it is extremely brief but basically on
9 the first page you request an evidentiary hearing, the
10 Court says, so you are challenging the results of the drug
11 test on May the 15th. And then you say, Your Honor, we
12 are requesting an evidentiary hearing.

13 MR. HENDERSON: Correct.

14 THE COURT: And then the Court, well, the evidence
15 here in the court is what's been presented. I am sure you
16 have got a copy of it, it is the result of the drug test.
17 I object to anything introduced to the Court. Second
18 page, sorry, third page the Court says, evidence before
19 the Court, the only evidence it is going to consider
20 unless you are willing to present something contested
21 otherwise. He seems to be inviting you to offer whatever
22 you would offer in the way of testimony to contradict the
23 results that are involved here.

24 MR. HENDERSON: But, Your Honor, he has got to put,
25 number one, you can't have the Court be the Judge, the

1 jury and executioner which I have got a fundamental
2 problem with, number one. Number two, nothing is in
3 evidence for me to contest. The burden I so applicably
4 note to the Court, the burden is not on me or Mr. Chrisley
5 to prove or disprove anything. The Government has got to
6 come forth with evidence that my client more likely than
7 not has violated the term of his conditional discharge.
8 That is what the evidentiary hearing is. Your Honor, I
9 mean it would be the same context up in circuit court for
10 a probation hearing. You have got a probation agent
11 standing over here who you put under oath and says, Your
12 Honor,--

13 THE COURT: You don't put the probation agent under
14 oath.

15 MR. HENDERSON: Okay.

16 THE COURT: The probation agent simply reports, I was
17 monitoring John Smith and John Smith violated drug tests
18 on April 1st, April 2nd and April 23rd. Now, if John
19 Smith wants to stand up there and say, hey, it is
20 impossible for me to have violated a drug test on April
21 the 23rd because I was vacationing in Charleston that week
22 and here is the receipt from the hotel that demonstrates
23 that I wasn't even present in Greenwood County. Then he
24 can do that but it is still, it is what it is and a
25 conditional discharge I think is a lot like that

1 probationary hearing. I hear your concerns about the
2 Court being Judge, jury and executioner, whatever. And it
3 is not that I am not sympathetic to those concerns but
4 this is typically how a conditional discharge is done.
5 The person is let go, if the Court doesn't hear anything
6 back then the charge is simply evaporated after about six
7 months, they go away once the person has completed all of
8 their drug tests. It is only when something happens in
9 the way of a drug test result that it is reported back to
10 the Court, not to make Mr. Andrew's argument for him. Let
11 me hear from you on that, Mr. Henderson.

12 MR. HENDERSON: Here, Your Honor, you have got the
13 government has put forth no evidence. At least in the
14 probation revocation setting you have got an agent over
15 here and says, hey, John Doe has moved from his residence,
16 he has changed his employment, he flunked a drug test.
17 And then that is putting forth say a prima facia case
18 which the defendant can come in and rebut. Like I said, I
19 was in Charleston that day, I couldn't have failed this
20 drug test. And, Your Honor, if you look at the last
21 document that I put in this file, it is kind of eerie that
22 attorney John O'Leary in Columbia just recently sent this
23 to me, he had basically this same thing, same sort of
24 event happen in front of him with one of his client's
25 where actually it looks like the Government was

1 prosecuting this, the conditional discharge violation and
2 actually put forth evidence suggesting or tried to suggest
3 that this Nutt fellow, N-U-T-T, had violated his
4 conditional discharge and Judge Alison Lee reversed it and
5 said no. The fact that in this case, he had something
6 introduced into evidence saying that wasn't sufficient to
7 establish Mr. Nutt violated his conditional discharge,
8 where here in Greenwood Mr. Chrisley, we have nothing in
9 evidence other than the Court waving around a piece of
10 paper saying that I think you flunked a drug test. I mean
11 that is not in the record, where the Court got that is not
12 in the record, who signed off on it is not in the record,
13 none of that. And, Your Honor, we think that, I mean that
14 is the whole idea of an evidentiary hearing that my client
15 has got to be able to hear and see what is being presented
16 against him and then he has an opportunity to present a
17 defense, cross-examine, that type of stuff, Your Honor.
18 And I thought it was eerie that this Nutt order came out
19 here in December. And the other cases I set forth, Your
20 Honor, talks about the constitutional dimensions of having
21 a proper and valid evidentiary hearing and the parole
22 violation and the probation violation context and here,
23 you know, by statute this is the probation context, the
24 conditional discharge context. And, Your Honor, I would
25 ask that based upon all of this that the Court vacate this

1 ruling again and if the Government wants to prove this
2 make them prove it proper.

3 THE COURT: Well, Mr. Andrews, what is the State's
4 position concerning this?

5 MR. ANDREWS: Your Honor, first we would note that,
6 while the Honorable Judge Lee's opinion may be persuasive,
7 it is not binding upon this Court. Furthermore a
8 conditional discharge in Magistrate's court is not exactly
9 like a probation violation. In general sessions when
10 somebody is placed on probation they are then monitored by
11 the probation department. And a conditional discharge in
12 Magistrate's court the Magistrate is, it is the
13 Magistrate's court who is monitoring a defendant for their
14 progress on the condition of this charge. It sounds like,
15 Your Honor, Judge Johnson had a copy of the drug results
16 which he would have gotten because the Magistrate was the
17 one supervising the conditional discharge. At the hearing
18 Judge Johnson asked if anyone chose to object to those
19 results, noting that that would be the only evidence
20 entered into the hearing.

21 MR. HENDERSON: But it was never entered into
22 evidence, Your Honor. It wasn't presented to us and I
23 dare say it is not in the Court's file.

24 THE COURT: Well, the transcript seems to reflect
25 that communication was had to Judge Johnson, I understand

1 your contentions, I do Mr. Henderson, one-hundred percent,
2 I understand exactly what you are saying. And ideally I
3 think it would be preferable to have those drug tests
4 results in there. On a practical level, Mr. Henderson,
5 people enter conditional discharge pleas thousands of
6 times a day throughout the State. On a practical level,
7 if conditional discharge is to remain a, and I am talking
8 public policy at this point, but if it is to remain a
9 viable potential disposition and if every time someone
10 test positive or violates the terms of that conditional
11 discharge, if a full-blown evidentiary hearing has to be
12 held where the person who performed the drug test and
13 usually these are done by private operations, the cost is
14 born by the individual involved. But the Court in
15 supervising this individual on the conditional discharge
16 just like in drug court the way I supervise folks, if you
17 have to then subpoena the individual who administered the
18 test, concern yourself with things like chain of custody,
19 subject that person to cross-examination, I don't see how
20 it is going to be possible to continue every time, this is
21 what it is. Let's assume for a moment I grant your
22 request, I reverse it and I send it back to the
23 Magistrate. The Magistrate in all likelihood will then
24 issue a subpoena for the person, have them appear in
25 Court, you will get your evidentiary hearing where the guy

1 will sit on the stand and two questions will be asked,
2 well, did you test this person on May the 14th? Yes, I
3 did. What were the results. Positive for X.

4 MR. HENDERSON: A couple of things, Your Honor.
5 Number one, I don't want to go into the public policy
6 argument statewide because very few conditional discharge
7 cases is there a dispute about anything. And even less of
8 them are represented by me. I mean, I think when it is a
9 civil context and again, I think the U.S. Supreme Court
10 has been clear that you don't have to go into the
11 full-blown criminal stuff that you have to do to get
12 something into evidence in the criminal court. But I
13 think you have to at least meet some threshold of
14 relevancy and competency to get documents and testimony
15 into evidence even at a conditional discharge hearing.
16 And I am not going to suggest to the Government how you do
17 it, I would have my own ideas about how that can
18 practically be done. And I am also not going to give away
19 my hand. But if the Court did remand it, you have got all
20 sorts of other issues going on and I would dare would see
21 another appeal before we ever had any type of hearing on
22 the merits.

23 THE COURT: I understand but again the Court is
24 acting as somewhat the probation agent in these
25 conditional discharge situations and the statute seems to

1 authorize that. I think you can even agree with that.

2 MR. HENDERSON: It is a probation that is monitored
3 by the Magistrate's Court. But, Your Honor, no Judge can
4 introduce stuff into evidence. And even here he didn't
5 even, Judge Johnson didn't try to introduce them into
6 evidence. It is almost like he took it upon himself to be
7 the long arm of the law and the Solicitor's office and
8 didn't even do the decency to try to put it into evidence,
9 just waiving around a sheet of paper, not testimony about
10 where he got it, how he got it, chain of custody other
11 than I think he flunked it.

12 THE COURT: Well, again if you disputed any of that
13 and he is waiving around a piece of paper that obviously
14 reflects a positive drug test. If you are disputing that
15 what prevents you from contacting the and again we are in
16 the probation type of a context, here is the information
17 that I have got. Gee, Judge, that can't be correct and
18 here is the testimony. You said we request an evidentiary
19 hearing, certainly you would have been at liberty to
20 subpoena the person who administered the drug test, you
21 would have been at liberty to offer any sort of evidence
22 concerning the reliability of that drug test.

23 MR. HENDERSON: That is the burden shifting off the
24 front, Your Honor.

25 THE COURT: Which it is but that is the way it works

1 when you are on probation.

2 MR. HENDERSON: Even up in big court, circuit court,
3 that the Government Agent still has to come in and put
4 forth a prima facia case. Your Honor, John Doe flunked
5 the marijuana test I gave him last week. John Doe moved
6 from his residence and didn't tell me he was moving, you
7 have got testimony, you have got the Government's version
8 of the case before you and then you have got John Doe over
9 here that is saying, no, that didn't happen, I was in
10 Charleston, that type of stuff. But here there is nothing
11 for me to put up a defense to cross-examine, to contest
12 because there is not evidence in the record suggesting
13 that my client has violated anything to do with this
14 conditional discharge other than the Court waiving around
15 a piece of paper that I haven't seen, that is not in the
16 Court's file, that is not in the appellate file, I don't
17 know what is on that sheet of paper, Your Honor. And that
18 is, just causes me grave concern that our Magistrates are
19 trying to doing stuff like this.

20 THE COURT: Mr. Andrews.

21 MR. ANDREWS: Your Honor, I guess, you mentioned this
22 and I said it before and I am not going to say that I am
23 exactly pleased about it but the Magistrate's court is in
24 this case acting like a probation agent. And, again Mr.
25 Henderson is correct, in general sessions you have a

1 probation agent who presents a case, puts violations on
2 the record. Your Honor, in this case there is a record,
3 we have it before us. Mr. Henderson, based on the results
4 that we received on the drug test I am inclined to say
5 that your client has violated his conditional discharge.
6 To me that was introduced into evidence, there was a
7 record of it. If the Magistrate court is acting as a
8 probation agent as they are in this case and as the
9 conditional discharge statute seems to authorize that was
10 introduced into evidence.

11 MR. HENDERSON: Your Honor, stuff in evidence is
12 marked as exhibit A, exhibit 1. I mean that is evidence,
13 if it is non-verifiable you have got to have something
14 marked as evidence, moved into evidence, competent
15 evidence. That was not the case here other than just the
16 Court's assertions that I think your client has flunked
17 the drug test.

18 THE COURT: But again when I deal with probation
19 revocations, if somebody says John Smith was convicted of
20 assault and battery and that is one of the elements that I
21 am using for the violation it doesn't require the actual
22 ticket be submitted into evidence demonstrating that
23 conviction. It is sufficient for the individual probation
24 agent to simply say, John Smith was convicted of assault
25 and battery and fined \$300.00 dollars in Magistrate's

1 court. At that point and time John Smith has an
2 opportunity to say, whoa, whoa, whoa, that wasn't me, that
3 was another John Smith and that is the probation agent's
4 mistake. Here is evidence that I have that the John Smith
5 they are talking about is not me.

6 MR. HENDERSON: I follow you loud and clear but in
7 that case you had the Government put forth evidence that
8 this actually happened. There is something there--

9 THE COURT: I am going to the question about the
10 marking, you say it has to be marked as an exhibit. I
11 don't agree with that assertion, I don't know that that is
12 correct.

13 MR. HENDERSON: Then how else, actually if you flunk
14 a drug test up in circuit court the probation agent I
15 guess is going to give you a copy of the flunked drug
16 test. You have got to have something--

17 THE COURT: They actually don't, they just simply
18 tell you that he flunked the drug test on date X, they
19 don't actually provide you with a copy of that. It is
20 very informal.

21 MR. HENDERSON: But you still have got to be able to
22 see what the Government is accusing you of and you are
23 hearing it from a probation agent, here I have just got
24 Magistrate telling me this happened without any proof to
25 back it up, Your Honor.

1 THE COURT: You didn't actually have a chance to look
2 at the drug test sheet?

3 MR. HENDERSON: I still have never seen it, Your
4 Honor. Again, the burden is not on me to go out here and
5 do the prosecution's job for them. And in this case the
6 Court though it was the prosecutor and it just wasn't my
7 job to go out here to collect evidence allegedly against
8 my client.

9 THE COURT: Well, your client is invoking his right
10 to remain silent and you request an evidentiary hearing?

11 MR. HENDERSON: Correct which puts the burden back on
12 the Government to put forth evidence more likely than not
13 my client has violated the terms of his probation.

14 THE COURT: I understand your position. Thank you.

15 MR. HENDERSON: Thank you, Judge.

16 MR. ANDREWS: Thank you, Judge.

17 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

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