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Feb 28 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Aiken County

Honorable Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH E. PARKER,

APPELLANT

APPELLATE CASE NO. 2023-001277

ANDERS BRIEF OF APPELLANT

GARY H. JOHNSON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in revoking appellant's probation without making specific findings of fact that allow for judicial review of the abuse of discretion standard?

STATEMENT OF THE CASE

Kenneth Parker was charged with financial transaction card theft under S.C. Code Ann. § 16-14-0020 and indicted by an Aiken County Grand Jury. R. 1. On December 8, 2022, he pled guilty to the charge and received a sentence of five years' incarceration suspended to five years' probation. R. 3.

On March 29, 2023, appellant was served with an arrest warrant alleging violation of the terms of his probation. R. 6. He appeared before the Honorable Donald Hocker for a probation revocation hearing. R. 9. Appellant was represented by Laura McCann; agent Finch with the South Carolina Department of Probation, Parole, and Pardon Services prosecuted the matter on behalf of the state.¹ Finch asserted appellant failed to report, failed to make contact, and failed to have a valid residence plan. R. 12, ll. 9 – 16.

At the conclusion of the hearing, over counsel's objection, Judge Hocker partially revoked appellant's suspended sentence to 30 months' incarceration and terminated the remaining balance of probation, with credit for 67 days' time served. R. 15, ll. 21 – 24; R. 18.

This appeal follows.

¹ Agent Finch's first name was not recorded in the transcript.

STANDARD OF REVIEW

Probation is a matter of judicial grace and a form of clemency. See S.C. Code §§ 24-21-410 (1976 as amended); State v. Lee, 350 S.C. 125, 564 S.E.2d 372 (Ct. App. 2002); State v. White, 218 S.C. 130, 61 S.E.2d 754 (1950). “While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice.” White, 218 S.C. at 136, 61 S.E.2d at 756. The determination of whether to revoke probation in whole or part rests within the sound discretion of the [circuit] court.” State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 655 (2006). The decision “to revoke probation generally rests within the circuit court's discretion, [however] an appellate court should reverse when that decision is based on an error of law or lacks supporting evidence.” State v. Crouch, 355 S.C. 355, 359, 585 S.E.2d 288, 291 (2003)(quoting State v. Brown, 349 S.C. 414, 417–18, 563 S.E.2d 339, 340 (Ct. App. 2002). “An appellate court will reverse the [circuit] court's decision where there has been an abuse of discretion.” State v. Miller, 404 S.C. 29, 33, 744 S.E.2d 532, 535 (2013).

An abuse of discretion occurs when the [circuit] court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the [circuit] court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious.

Id., 370 S.C. at 94, 634 S.E.2d at 656.

ARGUMENT

The trial court erred in revoking appellant's probation without making specific findings of fact that allow for judicial review of the abuse of discretion standard.

At the time of the violations, appellant was homeless. R. 13, ll. 8 - 11. He faced challenges surrounding the deterioration of his relationship with the mother of his children and her abandonment of her parental responsibilities along with his inability to provide his children with an alternative, stable home environment. R. 12, l. 23 – 5, l. 11. On top of those challenges, appellant's mother passed away, further impacting his ability to comply with the reporting requirements connected with his probation. R. 12, ll. 8 – 16.

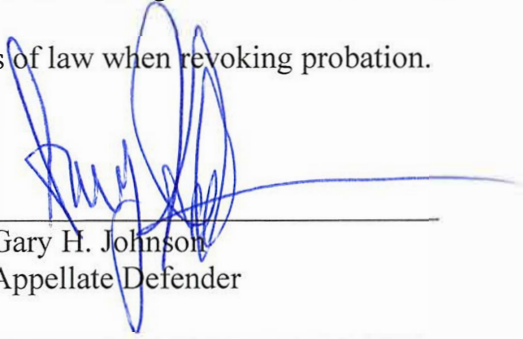
While counsel for appellant admitted the violation of not reporting, by the time of the hearing appellant had made progress towards working through these various problems since his initial incarceration for the violations. R. 12, l. 14 – 6, l. 20. Rather than weigh the significance of the violations against the appellant's challenges, the trial court revoked probation. R. 15, ll. 21 – 24. The trial court made no findings of fact or conclusions of law regarding the propriety of the revocation. This has provided this Court with little to no guidance in the record upon which to determine whether an abuse of discretion has been made.

The absence of specific findings of fact in probation revocation settings make judicial review impossible. *See Fishburne v. State*, 427 S.C. 505, 512, 832 S.E.2d 584, 587 (2019) (noting the Court's "numerous opinions addressing a PCR court's failure to make adequate findings of fact and conclusions of law regarding duly raised issues."); *Davis v. Jennings*, 304 S.C. 502, 506, 405 S.E.2d 601, 604 (1991) (requiring "when a protective order sealing the record is sought, the trial court shall make specific factual findings, on the record"). This Court is left to speculate on whether the lower court properly exercised that discretion in the present case.

While probation is an act of grace and clemency, once that grace has been granted, it is incumbent on the court to make specific findings of fact and conclusions of law when that grace is revoked. This ruling “reveals no discretion was exercised” and may conceal “arbitrary and capricious” motives behind a thin record. *See Miller*, 404 S.C. at 33, 744 S.E.2d at 535.

CONCLUSION

Based on the foregoing, Appellant respectfully requests that the probation revocation decision be reversed, and this case remanded for a new hearing with instructions that the lower court make specific findings of fact and conclusions of law when revoking probation.



Gary H. Johnson
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of February, 2024.

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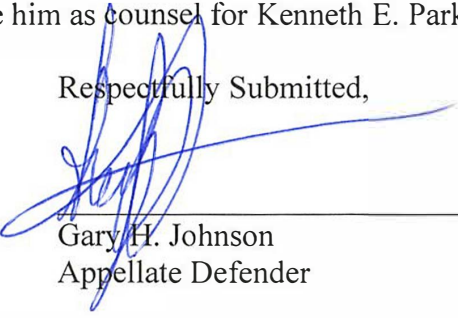
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kenneth E. Parker states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Donald B. Hocker, which was held on August 3, 2023, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

Wherefore, he asks the Court to relieve him as counsel for Kenneth E. Parker.

Respectfully Submitted,



Gary H. Johnson
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of February, 2024.

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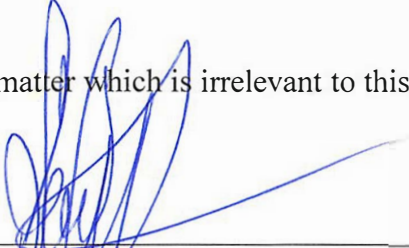
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**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment:
- (2) Signed Standard Conditions of Probation
- (3) Probation Violation Report
- (4) Probation Arrest Warrant
- (5) Notice of Probation Hearing
- (6) Entire Transcript of Probation Revocation Hearing
- (7) Order Revoking Probation

I certify that this designation contains no matter which is irrelevant to this appeal.



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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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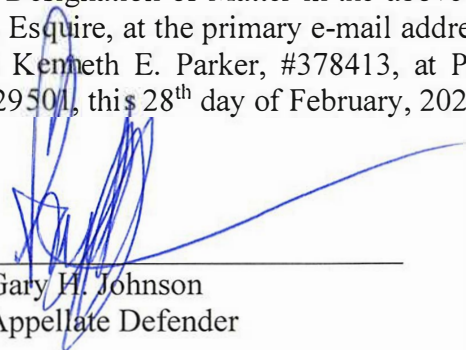
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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Anders Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Matthew C. Buchanan, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Kenneth E. Parker, #378413, at Palmer Pre-Release Center, 2012 Pisgah Road, Florence, SC 29501, this 28th day of February, 2024.



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