

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Ninth Circuit, Charleston County
The Honorable Alison R. Lee, Circuit Court Judge

Appellate Case No.: 2024-001118

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SC Court of Appeals

THE STATE,

RESPONDENT

v.

CURTIS LEMON,

APPELLANT

INITIAL BRIEF OF RESPONDENT

Michael McMullen
Legal Counsel, SC Bar #65483

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

ATTORNEY FOR RESPONDENT

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STATEMENT OF THE ISSUES ON APPEAL

Did the Circuit Court err when it revoked Appellant's Community Supervision for his refusal to comply with counseling and polygraph examinations required of sex offenders on Community Supervision, or must the Circuit Court modify the terms of Community Supervision because Appellant professes his innocence, "feels he's done enough time for the crime" he denies having committed, because he contends sex offender treatment "isn't right for him," and because these requirements were not ordered when the initial sentence was issued?

STATEMENT OF THE CASE

Appellant Curtis Lemon was convicted after a jury trial of first degree criminal sexual conduct and manslaughter which occurred on or about January 9, 1998. The Honorable Gerald C. Smoak, Jr. presided over the trial, and after his conviction on March 19, 1999, sentenced the Appellant to serve thirty years' imprisonment.

Appellant appealed those convictions. The appeal was dismissed on April 5, 2002. Thereafter, Appellant pursued numerous other collateral actions, including at least three PCR actions, two PCR appeals, and two post-conviction DNA testing actions, all of which were denied and dismissed.

Appellant was released from South Carolina Department of Corrections custody on June 30, 2023, and placed under the supervision of South Carolina Department of Probation, Parole and Pardon Services ("the Department" or "SCDPPPS") in the Community Supervision Program (CSP) pursuant to S.C. Code § 24-21-560. According to his conditions of release, Appellant was required to undergo sex offender counseling, which includes group therapy sessions and taking polygraph tests.

On September 28, 2023, Appellant was terminated from sex offender treatment for refusal to participate in group therapy and to submit to a polygraph test. An agent of the Department initiated revocation proceedings in General Sessions Court. The first of three Circuit Court hearings was conducted before the Honorable Deadra L. Jefferson on November 13, 2023. The second hearing was before the Honorable Jennifer B. McCoy on December 18, 2023. His third and final hearing was before the Honorable Allison R. Lee on February 12, 2024, at which time he was revoked for one year.

At the first two hearings, faced with imminent incarceration, Appellant or his counsel stated at the hearings that he would comply with the conditions of CSP. After the first two hearings, he again refused to participate in sex offender counseling or to submit to a polygraph as part of his sex offender treatment, requiring the agent again to summon him to court for another hearing. Each time the agent again recommended revocation of one year, the maximum allowed by § 24-21-560(C).

At his third CSP revocation hearing, Appellant informed the circuit court he was refusing to comply with counseling. The court revoked Appellant's Community Supervision for one year. Appellant's Counsel filed a Motion to Reconsider the decision to revoke one year of Appellant's Community Supervision on February 20, 2024. On June 25, 2024, the court denied the motion to reconsider. This Appeal followed.

On appeal, the Appellant argues that, because he "feels he's done enough time for the crime," maintains his innocence, he contends sex offender treatment "isn't right for him," and because these requirements were not ordered when the initial sentence was issued that he should not be required to undergo counseling or take polygraphs. He argues the court should have eliminated those requirements, and the circuit court judges' refusal to do so amounts to an abuse of discretion. In reply, Respondent would argue that the circuit court did not err or abuse its discretion when it clearly found the CSP conditions of sex offender treatment and counseling as fair and reasonable, and that Appellant's refusal to comply constituted a willful violation of that condition warranting a revocation. Respondent's Brief follows.

STANDARD OF REVIEW

The decisions whether an alleged violation was willful and whether to revoke community supervision are discretionary. The trial court will not be reversed unless the appellant can show an abuse of that discretion. State v. Garrard, 390 S.C. 146, 151,700 S.E. 2d 269, 272 (Ct. App. 2010) (citing State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 655 (2006) (applying an abuse of discretion standard of review to the related context of an appeal from an order revoking probation). “Where there is any evidence to support the court's factual findings, there is no abuse of discretion.” Id.

ARGUMENT

- 1. The circuit court did not err or abuse its discretion when it elected to revoke Appellant for willful violations of community supervision even though it had the authority to continue him on supervision with modified conditions.**

Appellant argues the court erred in finding that it had no decision but to revoke Appellant’s probation due to his termination and failure to re-enroll in counseling along with his failure to take a polygraph examination as a part of the counseling. He argues that the controlling statute states that the circuit court has the authority to keep Appellant on the community supervision program (CSP) with other terms and conditions it deemed appropriate. Thus, Appellant claims that the court erroneously found it had no discretion over the matter.

Respondent would submit that Appellant’s argument ignores the reality that the circuit court *was* aware that it could have continued him on CSP without the conditions he objected to; it simply chose, in its discretion, to hold Appellant to those conditions. Thus, after his repeated refusal to comply and his in-court statements which implied he would continue to refuse, the court properly revoked one year.

SCDPPPS is responsible for setting the terms and conditions of CSP. S.C. Code § 24-21-560(B). This responsibility is then subject to review and approval by the circuit court in the event of an alleged violation of those terms and conditions. After an agent initiates process through a citation or warrant, the court shall determine whether:

- (1) the terms of the community supervision program are fair and reasonable;
- (2) the prisoner has complied with the terms of the community supervision program;
- (3) the prisoner should continue in the community supervision program under the current terms;
- (4) the prisoner should continue in the community supervision program under other terms and conditions as the court considers appropriate;
- (5) the prisoner has willfully violated a term of the community supervision program.

If the Court determines that a prisoner has willfully violated a term or condition of the community supervision program, the court may impose other terms and conditions considered appropriate and may continue prisoner on community 6 supervision, or the court may revoke the prisoner's community supervision and impose a sentence of up to one year for violation of the community supervision program.

S.C. Code § 24-21-560(C).

Appellant submits that he should have been permitted to remain on community supervision probation. The controlling statute states that when an individual has been found to commit a community supervision probation violation, the court may impose other terms and conditions it deems appropriate and may continue the individual on community supervision probation. Id. Of course, the court also may revoke the supervision and impose a sentence of up to one year.

Appellant was ordered by the Department to complete sex offender treatment, including taking a polygraph examination and participating in group therapy. The treating psychiatrist, Dr. Burke, issued a letter dated September 28, 2023, stating Appellant was terminated from sex offender treatment for non-compliance. Consequently, Agent Holmes of the SCDPPPS initiated revocation proceedings in General Sessions Court.

Three circuit court judges ordered appellant to comply.

On November 13, 2023, Defendant appeared for his first of three CSP violation hearings. This hearing was before the Honorable Deadra Jefferson. At the hearing, according to the agent, “[Appellant] requested to come to court because [Appellant] stated he’d rather just go back to prison if he has to do sex offender treatment.” (Tr. 1, p. 5.) Judge Jefferson stressed during the hearing, “sex offender treatment is a requirement of his sentence.” (Tr. 1, p. 11.) She stated unequivocally, “I’m not modifying any of the conditions that are required by Probation by the regulations that have been delegated by the legislature. I don’t have that prerogative or that power.” (Tr. 1, p. 12.)

Respondent would acknowledge that Judge Jefferson could have found the condition unreasonable, but Record is clear that she did not. Furthermore, to the extent that Appellant’s argument lies in Judge Jefferson’s statements that she does not have the power to modify the conditions of CSP, Respondent would submit that § 24-21-560(C) only affords the circuit court to *impose* additional conditions, not delete them – which is what Appellant wanted to happen.

Ultimately, Judge Jefferson continued Appellant on CSP, giving him thirty days to get re-enrolled in treatment and to take a polygraph test. This was not appealed by Appellant, so Respondent would submit that Judge Jefferson’s statements about her discretion over the conditions of CSP are not the subject of this Appeal.

Instead, Judge Jefferson, after speaking directly with Dr. Burke and confirming that he would be required to take a polygraph, asked Appellant whether he would “take the polygraph or is he still going to be adamant about not taking the polygraph?” (Tr. 1, p. 23). Counsel for Appellant stated, “Your Honor, my client will take the polygraph.” (Tr. 1, p. 24). Judge Jefferson gave Appellant thirty days to do so. (Tr. 1, p. 25).

Appellant again refused to take a polygraph exam. Therefore, a little over thirty days later, on December 18, 2023, the Honorable Jennifer McCoy presided over Appellant's second CSP violation hearing. Probation Agent Holmes stated that despite what was promised at the November 13, 2023, hearing, Appellant again continued to refuse to participate in sex offender treatment (Tr. 2, p. *). and refused to submit to the polygraph. (Tr. 2, p.*). Agent Holmes again recommended revocation. Appellant's counsel defended his refusal by arguing that the requirement for sex offender counseling and submitting to the polygraph exam were not in writing and were not part of Appellant's original sentence. (Tr. 2, p*). Judge McCoy then put those requirements in writing. She explained to Appellant, "[complying with the polygraph requirement] doesn't affect your maintenance of your position on your guilt or innocence. It's just going to be that you are mandated to do it by order of the Court." (Tr. 2, p *).

Despite requirements of the Department and the written order of Judge McCoy that Appellant attend sex offender counseling and take a polygraph, Appellant refused to sign an acknowledgment of the order, to participate in counseling, and to take a polygraph. (R. p.*).

This resulted in a third CSP revocation hearing on February 12, 2024, before the Honorable Alison R. Lee. Having heard from the Agent and from counsel for Appellant, Judge Lee stated to Appellant: "[G]iven the fact that there was a trial and that you have gone through all your appeals, you have been through post-conviction relief, and none of that has been changed, you still have to abide by those requirements. And with the criminal sexual conduct charge there is a requirement that you attend and complete sex offender treatment." (Tr. 3, p. 7).

"So, if you do not wish to comply with that, then you don't—it wouldn't be any reason not to send you back to jail. So based upon that I will revoke one year." (Tr. 3, p. 8).

Appellant presents as the crux of his argument that the circuit court incorrectly found that it had no other option but to revoke Appellant's community supervision. He argues that the court erred by not continuing him on supervision under other conditions because he has consistently maintained his innocence despite his convictions being upheld in an appeal and multiple post-conviction relief actions.

Respondent submits that there is no such finding by Judge Lee. This "finding," was never made, and it is this "finding" to which Appellant assigns error. Appellant states, "the Court erroneously found they had no discretion over the matter," which is nowhere in Judge Lee's record.¹ Appellant argues because the court has discretion it did not exercise, "the ruling of the lower court should be reversed accordingly." (Brief of Appellant, p. 5).

A revocation of CSP is closely analogous to a revocation of probation. "The CSP is a more stringent, closely monitored form of supervision than normal probation." State v. Dawkins, 352 S.C. 162, 167, 573 S.E.2d 783, 785 (2002). Respondent submits that the same authority and discretion the circuit court has over the revocation of probation should be extended to CSP revocation hearings. As such, the appellate courts' deference to the court's determination in probation revocation proceedings should also extend to CSP. "The determination of whether to revoke probation in whole or part rests with the sound discretion of the trial court." State v. Allen, 370 S.C. at 94, 634 S.E.2d at 655 (citations omitted).

Appellant appeared before three separate judges arguing, in essence, that because he has consistently maintained his innocence that the sex offender treatment conditions of CSP should not have been enforced. All three judges rejected this argument. Now before this Court, Appellant

¹ Respondent addressed the possible source of such a finding in Judge Jefferson's statement above.

seems to argue it is reversible error for the courts to have disagreed with him over which conditions of his community supervision he will abide by and which he will not.

Appellant claims in his brief that his “only violation was his termination from sex offender counseling for failure to take a polygraph or inform his counselor of the specific facts surrounding the sex offense he was charged with and convicted of. He complied with every other condition.” (Brief of Appellant, p. 6). The issue before this Court, however, is not that he complied with almost all the conditions of CSP, but that he willfully refused to comply with two reasonable conditions. Even after he was given two additional chances to comply, he refused. Therefore, the court was fully within its authority to revoke him for willful noncompliance.

Facing the certainty of a one-year revocation, Appellant twice stated that he would cooperate with counseling or with a polygraph examination. On the third occasion, the court revoked one year, stating: “I understand the position that you’re taking, but given the fact that there was a trial and that you have gone through all of your appeals, you have been through post-conviction relief, and none of that has been changed, you still have to abide by those requirements.” (Tr 3, p.7.)

Appellant’s attorney argued in the hearing that, “[I]t’s his position that (A) sex offender treatment isn’t right for him because of his insistence upon his innocence but also it wasn’t specifically ordered when the initial sentence was issued. And so for those reasons we would just request that he remain on release.” (Tr. 3, p.*).

The Department, not Appellant, has discretion over “[t]he period of time a prisoner is required to participate in a community supervision program” as well as “the terms and conditions of a prisoner’s participation.” S.C. Code § 24-21-560 (B). It is not up to the Appellant to decide the conditions of his CSP, or when he has done enough.

As Judge Lee correctly stated, Appellant “was released on standard conditions enforced on all sex offenders being released on community supervision probation. These conditions were reasonable, and [Appellant] stated he would comply with the conditions prior to release. [Appellant] willfully violated these conditions both initially and after being ordered to comply by two different judges. [Appellant] also informed this Court that he had no intention of complying with the counseling requirement when asked. Thus, this Court finds that [Appellant] willfully violated the terms of the community supervision program.

“Once the Court determines that a defendant has violated the terms of his release, the Court may revoke or impose other terms and conditions on the defendant that the Court deems appropriate. No part of the statute permits this Court to undermine PPP’s jurisdiction over setting the conditions or otherwise delete or modify the conditions set by PPP because of non-compliance. [Appellant’s] consistent defense of his innocence is not grounds for this Court to inappropriately modify the conditions of his release to only include conditions [Appellant] is satisfied with and is willing to comply with.”

(Order of Judge Lee, June 25, 2024, pp. 4-5).

CONCLUSION

Appellant’s assertion that the circuit court erred by holding that it had no other option but to revoke his CSP is not supported by the record, which shows that the court was aware of its options. Instead, it found the conditions of sex offender counseling and treatment involving the use of a polygraph to be fair and reasonable, thus determining that Appellant had willfully violated his CSP. The court’s decision to revoke his CSP was not in error.

(Signature appears on following page)

Respectfully submitted,



Michael McMullen
Legal Counsel

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

Columbia, South Carolina
March 3, 2025

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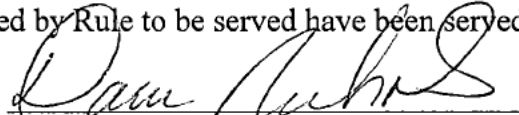
APPELLANT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant, hereby certify that I have served the within *Initial Brief and Designation of Matter* on Appellant this 3rd day of March, 2025, by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Chelsey F. Marto, Esquire
PO Box 8795
Columbia, SC 29201

I further certify that all parties required by Rule to be served have been served.



Dawn K. Nichols
Executive Assistant
South Carolina Department of Probation,
Parole, and Pardon Services
P. O. Box 207
Columbia, South Carolina 29202

State of South Carolina
Department of Probation, Parole and Pardon Services

HENRY McMASTER
Governor



CHADWICK A. GAMBRELL
Acting Director

293 GREYSTONE BLVD
POST OFFICE BOX 207
COLUMBIA, SOUTH CAROLINA 29202
Telephone: (803) 734-9220
Facsimile: (803) 734-9440
www.state.sc.us/ppp

March 3, 2025

The Honorable Jenny Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, South Carolina 29211

RE: State v. Curtis Lemon
Appellate Case No.: 2024-001118

Dear Ms. Kitchings:

Please find enclosed the Respondent's Initial Brief and Designation of Matter. Thank you for your assistance in this matter.

Sincerely,

A handwritten signature in black ink that reads "Michael D. McMullen".

Michael D. McMullen
Legal Counsel

MDM:dn
Enclosures

cc: Chelsey F. Marto, Esquire

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The Honorable Jenny Kitchings
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