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Mar 05 2025

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County

Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NICHOLAS JOHN CAPUTO,

APPELLANT

APPELLATE CASE NO. 2024-000966

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
Deputy Chief Attorney for Capital Appeals

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the circuit court improperly revoke appellant's probation in full?

STATEMENT OF THE CASE

Appellant was indicted in York County for driving under the influence, second offense, less than .10. R. 11-13. Appellant pled guilty and was sentenced to one year's imprisonment suspended upon the service of five days' imprisonment and thirteen months' probation. R. 13. On October 19, 2021, an arrest warrant was issued against appellant for a probation violation. R. 9. On June 3, 2024, appellant appeared before the Honorable J. Derham Cole on the probation violation. R. 1. Ugonna Udogwu represented appellant. R. 1. Judge Cole revoked the balance of appellant's probation. R. 6. This appeal follows.

STANDARD OF REVIEW

“The determination of whether to revoke probation in whole or in part rests within the sound discretion of the trial court.” State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 655 (2006).

ARGUMENT

The circuit court improperly revoked appellant's probation in full.

Appellant was charged with absconding his probation. R. 4. He admitted to absconding, but eventually turned himself in. R. 3. Appellant had other charges in North Carolina. R. 3. By the time of his probation hearing, he had been incarcerated for over six months. R. 3.

The probation agent asked for a partial revocation of ninety days, fines, and a civil judgment. R. 4. The agent said appellant had absconded to Nevada without asking permission, had been charged with other crimes, and had not paid his monetary obligations. R. 4. Defense counsel asked the court to terminate probation and sentence him to time served for the violation. R. 3.

Appellant's brother spoke on his behalf at the hearing. R. 5. Appellant had a job waiting for him if released. R. 5. His family was ready to help support him and help him make better choices. R. 5-6. Appellant's brother agreed that appellant had been "down a dark road," but that he began making better decisions in the recent months and cited the example of appellant turning himself in to the authorities. R. 5-6. Appellant agreed with the summation given by his brother. R. 6.

Judge Cole found appellant "willfully failed to comply." R. 6. The judge revoked the balance of appellant's probation and ordered him given credit for any time served. R. 6. The probation violation order showed appellant getting credit for thirteen days "pre-revocation hearing detention time." R. 8.

The trial judge erred in revoking appellant's probation in full because it was in excess of what the State asked. A probationer "is entitled to fair treatment, and is not to be made the victim of whim or caprice." State v. White, 218 S.C. 130, 136, 61 S.E.2d 754, 756 (1950). "[A]


probationer or parolee has a constitutionally protected liberty interest and cannot be denied due process simply because probation has been described as an act of grace.” State v. Allen, 370 S.C. 88, 96, 634 S.E.2d 653, 657 (2006). If the trial court’s decision lacks an evidentiary basis, it will be determined to be arbitrary and capricious and this Court may reverse. State v. Hamilton, 333 S.C. 642, 647, 511 S.E.2d 94, 96 (Ct. App. 1999).

The revocation in full lacked support in this record. The probation agent only asked for a partial revocation of ninety days. The agent’s request was largely the same as defense counsel’s request. While the *de facto* agreement was not binding, it should guide the judge’s decision. See Hamilton at 98, 511 S.E.2d at 650 (holding that agreements between defense counsel and probation officer are not binding on trial court).

The judge gave no reasons for exceeding the State’s request. R. 6. The judge only found that appellant had “willfully failed to comply.” R. 6. He had just heard from appellant’s brother who told the court appellant had a job lined up and had family ready to help him. Without any facts supporting the court’s decision to exceed the State’s recommendation, the full revocation was capricious. This Court should reverse.

CONCLUSION

For the foregoing reasons, the lower court should be reversed.



David Alexander
Deputy Chief Attorney for Capital Appeals

ATTORNEY FOR APPELLANT

This 5th day of March, 2025.

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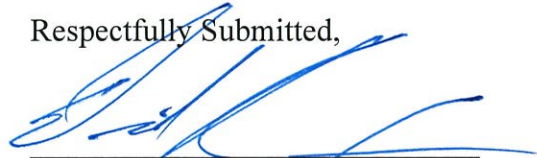
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Nicholas John Caputo 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 J. Derham Cole, which was held on June 3, 2024, 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 Nicholas John Caputo.

Respectfully Submitted,



David Alexander
Deputy Chief Attorney for Capital Appeals

ATTORNEY FOR APPELLANT

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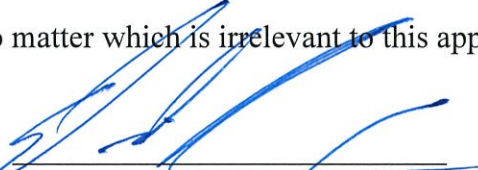
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**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment and sentence sheet;
- (2) Probation violation hearing transcript dated June 3, 2024;
- (3) Probation revocation order; and
- (4) Probation arrest warrant and affidavit.

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


David Alexander
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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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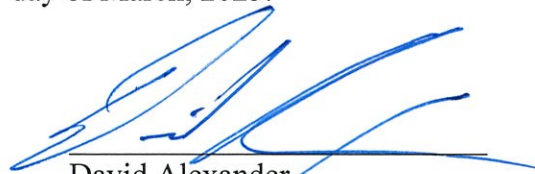
NICHOLAS JOHN CAPUTO,

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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 Nicholas John Caputo, #394560, at 1508 E. Broad Street, Statesville, NC 28625, this 5th day of March, 2025.



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