

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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DEC 19 2013

Appeal from Lexington County

R. Markley Dennis, Jr., Circuit Court Judge

SC COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JOSEPH C. TICE,

APPELLANT

APPELLATE CASE NO. 2013-001161

INITIAL BRIEF OF APPELLANT

BENJAMIN JOHN TRIPP
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the lower court err in revoking Appellant's probation where the court accepted that Appellant's disability prevented him from acquiring and paying the monies due under the terms of probation, where the court ruled this failure to pay was willful, and where the court did not assess whether adequate measures besides revocation were available to rectify the situation?

STATEMENT OF THE CASE

In May of 2011, the Aiken County grand jury indicted Appellant Joseph C. Tice on two counts of second degree criminal sexual conduct with a minor. R. *. On August 11, 2011, plead guilty before the Honorable G. Thomas Cooper, Jr. The plea court sentenced Appellant to sexual offender registration and concurrent twenty year sentences suspended to time served with five years of probation. R. *.

On April 16, 2013, an arrest warrant was issued for Appellant for violating the conditions of probation. R. *. On May 24, 2013, Appellant appeared at a probation hearing before the Honorable R. Markley Dennis, Jr. Rusty Rentz represented the State and Dayne Phillips represented Appellant. Tr. 1; Tr. 6, ll. 9-18. At the conclusion of the hearing, the court revoked six months of Appellant's probation. Tr. 7, ll. 19-22.

ARGUMENT

THE LOWER COURT'S REVOCATION OF APPELLANT'S PROBATION CONSTITUTED REVERSIBLE ERROR BECAUSE THE COURT FAILED TO MAKE THE FINDINGS PRESCRIBED BY LAW BASED ON THE EVIDENCE IN THE RECORD.

STATEMENT OF FACTS

The arrest warrant alleging violation of Appellant's probation conditions alleged that Appellant was terminated from sex offender counselling on April 11, 2013 and that he was in arrears for sex offender supervision fees totaling \$260.00 and for \$15.00 in court surcharges. R. *. At the probation hearing in the court below, Appellant explained to the court that his inability to pay resulted in the violations, including the counselling violation, which stemmed from his failure to pay for a polygraph test. Tr. 4, ll. 5-13. Appellant affirmed he could comply with all but the financial requirements of his probation. Tr. 4, ll. 22-23. Appellant also explained he could not pay because he was disabled to the point he was receiving disability benefits. He admitted that although he was disabled at the time of his original plea, he did not inform Judge Cooper because he was scared. Tr. 4, ln. 25—Tr. 5, ln. 24. The court then ruled that Appellant willfully violated his probation because he knowingly failed to disclose his inability to pay to Judge Cooper:

I find that he's in willful violation because he didn't advise the judge when the judge fashioned his sentence. He avoided going to jail by not saying a word that he could never pay for probation. He's told me under oath that he couldn't pay it when he was sentenced. I find that to be a willful violation for his refusal to disclose something that's very pertinent to a sentence.

Tr. 8, ll. 2-8. The court ordered a revocation of Appellant's probation for six months and a waiver of all past and future supervision fees. R. *.

DISCUSSION

The lower court's revocation of probation constituted reversible error because the court failed to make the findings prescribed by law based on the evidence in the record. Although "[p]robation is a matter of grace," the court may only revoke probation "upon an evidentiary showing of fact tending to establish a violation of the conditions." *State v. Hamilton*, 333 S.C. 642, 648, 511 S.E.2d 94, 97 (Ct. App. 1999). In *State v. Spare*, 374 S.C. 264, 647 S.E.2d 706 (Ct. App. 2007), this Court held a circuit court may only revoke probation on the basis of a failure to pay money by making the following findings based on sufficient evidence in the record: (1) The State has established that the probationer has violated the conditions of his probation. (2) The probationer's failure to pay was willful insofar as he either had the funds and chose not to or did not make a bona fide effort to acquire the funds. (3) If the probationer could not acquire the funds despite a bona fide effort, no alternate measures are adequate to meet the State's interests in punishment and deterrence. *State v. Coker*, 397 S.C. 244, 245-46, 723 S.E.2d 619, 620 (Ct. App. 2012).

At Appellant's hearing below, the lower court failed to make the second and third findings based on evidence in the record. With regard to the second finding, Appellant stated he did not have the funds to pay probation costs, and he was unable to earn them because he was disabled. Inferably, his only income was from disability benefits. Thus, the evidence plainly shows Appellant's failure to pay was not willful. The lower court did not make the proper inquiry into willfulness as prescribed under *State v. Spare*.

Because the record shows Appellant's failure was not willful, the proper ensuing inquiry was whether any measures besides revoking probation were adequate to punish

Appellant if called for and to deter future noncompliance with the probation conditions.
Again, the lower court failed to make this inquiry contrary to the mandate of *Spare*.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the ruling of the trial court and remand for a new probation hearing.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of December, 2013.

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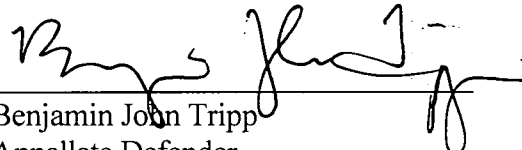
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) Two true-billed indictments;
- (2) Two sentencing sheets;
- (3) Probation Arrest Warrant;
- (4) Transcript of May 24, 2013 (12 pp.);
- (5) Probation revocation order.

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

December 19th, 2013



Benjamin John Tripp
Appellate Defender

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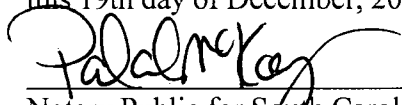
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Matthew Buchanan, Esquire, at South Carolina Department of Probation, Parole & Pardon Services, PO Box 50666, Columbia, SC 29250, this 19th day of December, 2013.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 19th day of December, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.