

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

Thomas A. Russo, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

BRIAN E. LORICK, JR.,

APPELLANT

Appellate Case No. 2013-000491

INITIAL BRIEF OF APPELLANT

WANDA H. CARTER
Deputy Chief Appellate Defender

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

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The probation revocation judge erred in denying counsel's motion to dismiss the probation revocation action brought against appellant charging him with failing to follow the probation agent's instruction that there must be "no contact with [the prosecutrix]" because this was not a judicially imposed condition of probation.

STATEMENT OF THE CASE

Appellant Brian E. Lorick pled guilty to assault and battery in the second degree during the June 2012 term of the Lexington County General Sessions Court before Judge Doyet A. Early, III. Appellant was sentenced to imprisonment for a period of three years, suspended upon the service of six months and two years probation. No appeal was taken from the plea.

A probation revocation hearing was held on appellant's behalf during the March 2013 term of the Lexington County General Sessions Court before Judge Thomas A. Russo. Robert M. Madsen represented appellant at the hearing. Judge Russo revoked appellant's probation in full.

Appellant appealed his probation revocation. This brief follows.

ARGUMENT

The probation revocation judge erred in denying counsel's motion to dismiss the probation revocation action brought against appellant charging him with failing to follow the probation agent's instruction that there must be "no contact with [the prosecutrix]" because this was not a judicially imposed condition of probation.

Appellant was on probation stemming from a conviction for assault against the mother of his child. Apparently, while on probation, appellant wrote letters to and accosted her. These actions resulted in the issuance of probation violation arrest warrants filed against him. Tr. 22, l. 24 – p. 23, l. 25; Tr. 4, l. 5 – p. 5, l. 18.

In existence in appellant's case was a form 1182 on which appellant's probation agent added a "no contact" with the victim prohibition. At the probation revocation hearing, appellant alleged that the "no contact" provision was not ordered by the prior circuit court sentencing judge and that there was no indication that appellant even consented to this form 1182 "no contact" addition imposed upon him by the probation agent. In other words, this "no contact" addition was not an enhancement of a condition, but rather an added probation condition which cannot stand. Clearly, the state construed the "no contact" provision as a violation of the "failure to follow the advice of agents" provision in seeking the probation violation arrest warrants in the case. Tr. 6, l. 19 – p. 8, l. 19; Tr. 11, l. 17 – p. 12, l. 15; Tr. 14, lines 7-10

The solicitor argued that the probation violation did not emanate from the "no contact" provision, but rather from appellant's "fail[ure] to accept and follow the advice of [the probation] agent." Tr. 8, l. 20 – p. 11, l. 16; Tr. 12, l. 18 – p. 13, l. 17.

The trial judge denied appellant's motion to dismiss and revoked his probation in full. App. 27, lines 11-15.

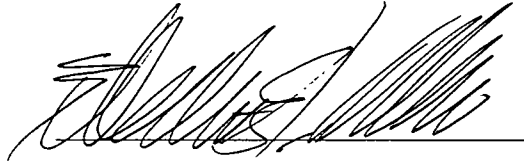
In State v. Stevens, 373 S.C. 595; 646 S.E.2d 870 (2007), the Court reversed the revocation of the defendant's probation for violating an agreement to participate in GPS monitoring and to avoid certain exclusive zones because these were not judicially imposed conditions, but rather additional unauthorized conditions imposed by the probation department. See also State v. Hicks #2, 382 S.C. 370; 675 S.E. 2d 796 (2009).

In the case at bar, the "no contact" provision with the prosecutrix was clearly an added unauthorized condition of probation put in place not by a judge, but by the probation department via form 1182. Here, the state attempted to bootstrap the "no contact" provision as falling under the heading of not "follow[ing] the advice of a probation agent." This "no contact" form 1182 addition was a specific category and by its very nature a separate prohibition standing alone. S.C. Code Ann. § 24-21-30 allows DPPPS to impose supervisory or enhancements to judicially imposed conditions, but disallows the addition of conditions of probation as this would violate the separation of powers clause per South Constitution Article 1, § 8. The instant "no control" prohibition was an agent's proposition that was an independent added condition of probation prohibited by Stevens and Hicks#2. The lower court erred in revoking appellant's probation via a violation on a non-judicially imposed condition of probation in the case.

CONCLUSION

Based on the foregoing argument, petitioner requests that the Court vacate appellant's probation revocation in the case.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of December, 2013.

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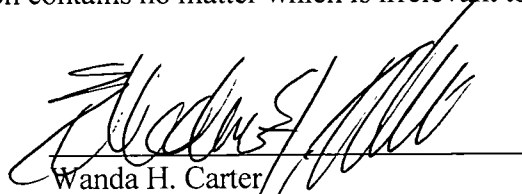
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) Pretrial Hearing Transcript dated February 8, 2013
- (2) Probation Revocation Transcript dated March 1, 2013
- (3) Indictment
- (4) Sentencing Sheet
- (5) Probation Violation Arrest Warrants

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

December 2nd, 2013.


Wanda H. Carter
Deputy Chief Appellate Defender

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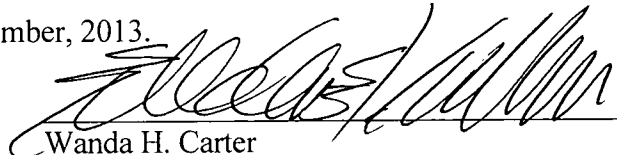
V.

BRIAN E. LORICK, JR.,

APPELLANT

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 Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Mr. Brian E. Lorick, Jr., #351415, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 2nd day of December, 2013.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of December, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.