

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable R. Markley Dennis, Jr., Circuit Court Judge
Case No. 2013-001161

THE STATE, RESPONDENT

v.

JOSEPH C. TICE, APPELLANT

BRIEF OF RESPONDENT

Matthew C. Buchanan
General Counsel

**South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 11589
Columbia, South Carolina 29211-1589
(803) 734-1343**

ATTORNEY FOR THE RESPONDENT

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JAN 22 2014

SC Court of Appeals

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S.C. Code Ann. § 24-21-4306

S.C. Code Ann. § 24-21-5606

STATEMENT OF ISSUE ON APPEAL

The circuit judge did not err in revoking Appellant's probation for failing to complete special conditions of probation, despite Appellant's insistence he could not pay for those special conditions.

STATEMENT OF THE CASE

On August 11, 2011, Appellant Joseph C. Tice plead guilty to two counts of second degree criminal sexual conduct with a minor. The Honorable G. Thomas Cooper, Jr., sentenced Appellant to two concurrent twenty year sentences suspended to time served and five years of probation. (Sentencing Sheets). As a result of the conviction, Appellant was placed upon the South Carolina Sex Offender Registry and required to abide by the standard conditions of probation and the standard sex offender conditions of probation.

On April 16, 2013, the Appellant was served a warrant for being terminated from sex offender treatment and other financial violations.

The Appellant then appeared before the Honorable R. Markley Dennis on May 24, 2013. He was represented by Dayne Phillips at the hearing. The court found a willful violation of probation and revoked six months and continued the Appellant on supervision. (Revocation Orders dated May 24, 2013).

The Appellant now brings this appeal before this court.

ARGUMENT

The circuit judge did not err in revoking Appellant's probation for failing to complete the special conditions of probation.

The arrest warrant alleged the following violations:

Subject has violated his probation in the following manner: He has failed to pay Sex Offender Supervision Fees at \$20.00 a week being \$260.00 in arrears. He has failed to pay Court Surcharges being \$15.00 in arrears on each account. Subject has failed to refrain from being terminated from sex offender counseling for failing to abide by counseling rule and regulations. He was terminated from treatment at SouthEastern Assessments, Inc. Sex Offender Counseling on 4/11/2013 by William Burke, Ph.D.LPC.

At the probation violation hearing, the agent presented information that Appellant was terminated from sex offender counseling. The court found that Appellant could not meet the requirements of probation and revoked six months and continued him on probation.¹(Revocation Orders dated May 24, 2013).

When the sentencing court suspends a sentence to probation, the sentence sheet incorporates by reference the standard conditions of probation. The Department of Probation, Parole and Pardon Services has developed the standard conditions for probation, as well as standard sex offender conditions for those offenders under supervision for an offense that requires the offender to register as a sex offender. S.C. Code Ann. § 24-21-430. (Standard Conditions of Probation and Standard Sex Offender Conditions Dated August 30, 2013). Criminal Sexual Conduct in the Second Degree is an offense which requires the defendant to register as a sex offender. S.C. Code Ann. § 23-3-430.

Condition 2 of the Standard Sex Offender Conditions reads:

I will attend, actively participate in, not give cause to be terminated from, and successfully complete any counseling/treatment program, to which I am referred by my agent, which may include polygraph or other treatment related testing, all at my own expense. I waive all rights to confidentiality between myself and my treatment provider, and authorize my treatment provider to disclose to my agent, the Court, the Parole Board, the releasing authority, and/or the hearing officer, information about my attendance and participation in the program.

¹ Although the Court continued Appellant on probation, the nature of the original offense will require Appellant to be released to the Department's Community Supervision Program (CSP) S.C. Code Ann. § 24-21-560. Pursuant to the holdings in State v. Dawkins, 352 S.C. 162, 573 S.E.2d 783 (2002), and State v. Picklesimer, 388 S.C. 264, 695 S.E.2d 845 (2010), Appellant will not be returned to his probation.

Consequently, Appellant was required to complete the sex offender treatment and counseling as a standard condition of Appellant's probation. Furthermore, paying for the treatment and conducting polygraph tests are included in the conditions.

The decision to revoke probation is within the sound discretion of the circuit court judge. State v. Hamilton, 333 S.C. 642, 511 S.E.2d 94 (1999). The Appellate court's authority is only to review the circuit court's decision to correct errors of law or if the evidence indicates the judge acted in an arbitrary or capricious manner. Id.

"The trial court must determine whether the State has presented sufficient evidence to establish that a probationer has violated the conditions of his probation." State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 655 (2006).

Appellant argues the circuit court erred because it did not find a willful failure to pay for his sex offender treatment. The cases Appellant cites in his argument can be distinguished from the case at bar, as they all involve the revocation of probation for the failure to pay fines or restitution. See State v. Spare, 374 S.C. 264, 647 S.E.2d 706 (Ct. App. 2007), State v. Coker, 397 S.C. 244, 723 S.E.2d 619 (Ct. App. 2012), and Bearden v. Georgia, 461 U.S. 660, 103 S.Ct. 2064 (1983). "[I]n those cases *involving the failure to pay fines or restitution*, the circuit judge must, in addition to finding sufficient factual evidence of the violation, make an additional finding of willfulness." Hamilton, 333 S.C. at 649 (emphasis added.)

While it is clearly well-settled that an offender may not be revoked for an inability to pay fines or restitution, this case deals with a different situation. Here, Appellant failed to attend and complete sex offender counseling. While monetary arrearages were included in the violation warrant, the circuit court specifically addressed the matter of Appellant being terminated from counseling. (Tr. 4, ll. 9-10).

Sex offender counseling is a vital and necessary component of Appellant's supervision which is intended to increase public safety by reducing his tendency to reoffend. The court in Bearden made it clear that their holding was not to be expanded beyond the payment of monies. "We do not suggest that, in other contexts, the probationer's lack of fault in violating a term of probation would necessarily prevent a court from revoking probation. For instance, it may indeed be reckless for a court to permit a person convicted of driving while intoxicated to remain on probation once it becomes evident that efforts at controlling his chronic drunken driving have failed. Ultimately, it must be remembered that the sentence was not imposed for a circumstance beyond the probationer's control 'but because he had committed a crime.' In contrast to a condition like chronic drunken driving, however, the condition at issue here-indigency-is itself no threat to the safety or welfare of society. Id. at 668, 2070, fn. 9 (citations omitted).

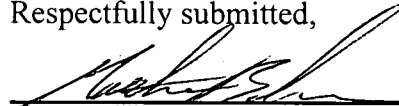
Indeed, as Bearden suggests, it should not be forgotten that Appellant committed a sexual offense against a child. His criminal actions have placed him under the supervision of the Department with the requirement that he attend, participate in, and complete sex offender treatment. "A defendant's poverty in no way immunizes him from punishment." Id. at 669, 2071.

Consequently, the circuit court did not abuse its discretion when it found that Appellant was in violation of the conditions of probation and revoked a portion of his sentence.

CONCLUSION

Based on the foregoing reasons the Respondent respectfully requests that the decision of the lower court to revoke Appellant's probation be upheld.

Respectfully submitted,



Matthew C. Buchanan
General Counsel

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Attorney for the Respondent

Columbia, South Carolina
January 17, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable R. Markley Dennis, Jr., Circuit Court Judge
Case No. 2013-001161

THE STATE, RESPONDENT

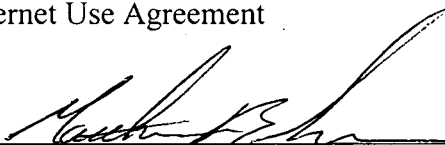
v.

JOSEPH C. TICE, APPELLANT

DESIGNATION OF MATTER

In addition to what Appellant has designated in the Record on Appeal, Respondent proposes the following additional information to be included in the Record on Appeal:

- 1- Standard Conditions of Supervision
- 2- Standard Sex Offender Conditions
- 3- Sex Offender Computer/Internet Use Agreement



Matthew Buchanan
General Counsel

January 17, 2014

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CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, hereby certify that I have served the within *Initial Brief of Respondent and Designation of Matter* dated January 17, 2014, on Appellant this 17th day of January, 2014, by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Benjamin John Tripp, Appellate Defender
S.C. Commission on Indigent Defense
PO Box 11589
Columbia, S.C. 29211-1589

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


Dawn K. Nichols
Executive Administrative Assistant

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

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January 17, 2014

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

RE: State v. Joseph Tice

Dear Ms. Kitchings:

Enclosed please find the original of the Initial Brief of Respondent and Designation of Matter dated January 17, 2014, along with proof of service in the above-referenced case.

Thank you for your cooperation in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Matthew Buchanan", written over a horizontal line.

Matthew Buchanan
General Counsel

MB:dn

Enclosures

cc: Benjamin John Tripp, Appellate Defender

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SC Court of Appeals

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

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January 17, 2014

Benjamin John Tripp, Appellate Defender
S.C. Commission on Indigent Defense
PO Box 11589
Columbia, S.C. 29211-1589

RE: State v. Joseph Tice

Dear Mr. Tripp:

Please find enclosed copies of the matter we designated for inclusion in the Record on Appeal.

Sincerely,

A handwritten signature in black ink, appearing to read "Matthew Buchanan", with a long horizontal line extending to the right.

Matthew Buchanan
General Counsel

MB:dkn

cc: The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals

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SC Court of Appeals