

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM LANCASTER COUNTY
Court of General Sessions
Brian M. Gibbons, Circuit Court Judge

Appellate Case No.: 2013-002510

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SC Court of Appeals

THE STATE,Respondent,

v.

JOSEPH WRIGHT, JR.,Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in entering the November 20, 2013, Order after the period of probation had expired?
2. Did the trial court err in entering the November 20, 2013, Order after the Defendant withdrew his consent?
3. Did the trial court err in entering an Order providing for a remedy of civil contempt?

STATEMENT OF THE CASE

On January 10, 2005, Joseph Wright, Jr. pled guilty to financial identity fraud, forgery, and obtaining signatures and property under false pretenses under S.C. Code Ann. §§ 16-13-510, 16-13-10 and 16-13-240 and respectively. (R. , Plea Agreements for Indictments 2003 GS 40-5502, 5503 and 5504 respectively, entered January 10, 2005) Mr. Wright was given three concurrent 10 year sentences, suspended upon service of 60 days of incarceration and five years of probation. Mr. Wright was also ordered to pay restitution in the amount of \$5,000 to Amos Price and in the amount of \$45,000 to Homeowners Mortgage Enterprise within 90 days of the Order and then serve the 60 days jail time, after which Mr. Wright would be on probation. (R. , Id. and Transcript of January 10, 2005, Hearing, pp. 33, lines 1-23; 38, lines 1-25; 39, line 1). At the January 10, 2005, hearing, it was noted in the record that Homeowners would be submitting a claim for additional restitution compensation. (R. , January 10, 2005, Transcript, page 35, lines 21-25).

July 18, 2007, the trial court entered an Order of Restitution, which superseded the previous January 10, 2005, Orders. (R. , July 18, 2005, Order of Restitution) The Order of Restitution noted that the Defendant had paid \$50,000.00 in restitution pursuant to the original sentence. (R. , July 18, 2005, Order of Restitution, p. 2, para 2). The Court waived the 60 day incarceration requirement and provided that the five year probationary period was to begin on July 1, 2007, and end July 1, 2012. (R. , July 18, 2005, Order of Restitution, p.2, para. 2 at bottom of page) The Court imposed an additional restitution requirement in favor of Homeowners in the amount of \$100,000 plus a \$15,000 collection fee to be “paid over the course of four (4) years (which is 80 % of Defendant Wright’s probation).” (R. , July 18, 2005, Order of Restitution, p.3, paras. 3-5) Finally, the Order of Restitution provided that, pursuant to “S.C. Code § 17-25-323(B), should Defendant Wright default in the restitution payments set forth herein, Homeowners, the Attorney General, the solicitor, and/or an agent of the Department of Probation and Parole may move

the court for a hearing to show cause why Defendant Wright's default should not be treated as a civil judgment or for a determination by the Court of any further remedy due." (R. , July 18, 2005, Order of Restitution, p.3, para. 4 [sic should be 6])

On March 27, 2009, Wright was arrested for violating the terms of his probation (R. , SCDPPPS Violation Report) On May 15, 2009, a probation revocation hearing was held, and Defendant was ordered to serve a total of 20 days on consecutive weekends starting May 16, 2009. (R. , Orders dated May 16, 2009, for Indictments 2003 GS 40-5502, 5503 and 5504 respectively). The trial court ordered the Defendant to make payments of \$5,000 on May 15, 2009, \$1,875.00 in June 2009 and \$1,875.00 in July 2009, payable directly to Homeowners. (R. , Id.) The trial court further recommended that the probation supervision fees be waived and that the "fine" [restitution] be converted to a civil judgment. (R. , Id.) The May 15, 2009, Orders did not change the term of probation specified in the Order of Restitution.

On May 21, 2013, probation services issued and served a citation on Defendant for failure to pay the remaining balance of the restitution in the amount of \$43,468.66. (R. , Probation Violation Citation).

On September 6, 2013, the trial court conducted a hearing on the probation services citation. Probation services represented at the hearing that Mr. Wright's probation was scheduled to expire on July 8, 2013, although the agent also stated that the Order of Restitution provided for a probation period beginning July 1, 2007, and ending July 1, 2012. (R. , Transcript of September 6, 2013, hearing, p. 2, lines 6-8 and 19-20) The trial court noted that probation services "want[ed] to terminate the probation [because] he has been on it for more than five years now." (R. , September 6, 2013, Hearing Transcript, p. 3, lines 19-24.)

At the September 6, 2013, hearing, the attorney for Homeowners outlined the terms of an agreement to the trial court: probation would be deemed to be over as of September

6, 2013, Defendant would be found in willful civil contempt for failure to make restitution payments in the amount of \$43,500 and sentenced to six months incarceration, but Defendant could pay \$5,000 as an initial payment and then \$1,500 a month thereafter for a total of \$38,500 in order to purge himself of contempt. (R. , September 6, 2013, hearing Transcript, p. 4, lines 3-25; p. 5, lines 1-10). Payments were to be made directly to Homeowners and Homeowners was authorized to file a show cause motion if Defendant failed to pay. (R. , September 6, 2013, hearing Transcript, p. 4, lines 10-18) As a side agreement, Homeowners would release Wright from liability under the judgment obtained in civil court against him. (R. September 6, 2013 hearing transcript, p. 5, lines 20-25) The Court entered the terms of the agreement on the record and terminated probation, and also requested Homeowners to prepare a consent order setting forth the terms of the agreement and a schedule for repayment. (R. , September 6, 2013 hearing transcript, pp. 9, lines 17-23; p. 10, lines 17-25; p. 11, lines 1-13)

On October 3, 2013, counsel for Defendant, S. Harrison Saunders, VI, notified the trial court in writing that the Defendant was now refusing to sign the proposed consent Order based on Defendant's contention that he had not been informed by his legal counsel that the State had to prove that his failure to pay restitution was willful in order to revoke his probation. (R. , Letter dated October 3, 2013, from counsel for Defendant, S. Harrison Saunders, VI, to the trial court).

The trial court signed the Order presented by Homeowners without the signatures of any of the parties. (The Order is undated, but was entered by the Clerk's Office on November 20, 2013) (R. , Order entered November 20, 2013) On November 8, 2013, Defendant filed a Notice of Motion and Motion To Reconsider with respect to the Order. (R. , Motion To Reconsider) That motion has not been ruled upon. On November 26, 2013, Defendant, represented by new legal counsel, filed a Notice of Intent to Appeal in the Court of Appeals. (R. , Notice of Appeal dated November 26, 2013) On January 8,

2014, Homeowners filed a Motion for Rule to Show Cause why Wright should not be held in civil contempt based on his failure to pay pursuant to the consent agreement. (R. Motion for Rule to Show Cause)

ARGUMENT

1. **The Trial Court Erred in Entering the November 20, 2013, Order After the Period of Probation Had Expired.**

S.C. Code Ann. § 24-21-440 provides that “The period of probation or suspension of sentence shall not exceed a period of five years and shall be determined by the judge of the court and may be continued or suspended *within the above limit.*” (Emphasis added) In addition, S.C. Code Ann. § 24-21-550 provides that “A probation term ordered to end upon the payment of fines, court costs, assessments, and restitution must continue until the clerk of court certifies in writing that all monies have been paid, *or the probation term has expired*, or the expiration of probation has been changed by a subsequent order.” (Emphasis added) Also, under S.C. Code Ann. § 17-25-322, restitution orders must provide for a repayment schedule that will “result in full payment of both restitution and collection fees by the end of eighty percent of the offender’s supervision period.” Thus, under South Carolina law, restitution requirements are tied to the probationary period and do not extend beyond the five year limit.

Probation may be revoked under S.C. Code Ann. § 24-21-460 if a warrant is issued during the period of probation by the probation agency pursuant to S.C. Code Ann, § 24-21-450. After the probationary period has expired, the court lacks subject matter jurisdiction to revoke probation. *State v. Crouch*, 355 S.C. 355, 359, 585 S.E.2d 288, (S.C. 2003). Furthermore, express waiver of statutory warrant requirements by the defendant is not sufficient to confer subject matter jurisdiction. *State v. Richburg*, 304 S.C. 162, 164-165, 403 S.E.2d 315, 317(S.C. 1991).

In addition, S.C. Code Ann. § 17-25-323 provides:

(A) The trial court retains jurisdiction of the case for the purpose of

modifying the manner in which court-ordered payments are made until paid in full, or until the defendant's active sentence and probation or parole expires.

(B) When a defendant has been placed on probation by the court or parole by the Board of Probation, Parole, and Pardon Services, and ordered to make restitution, and the defendant is in default in the payment of them or any installment or of any criminal fines, surcharges, assessments, costs, and fees ordered, the court, *before the defendant completes his period of probation or parole*, on motion of the victim or the victim's legal representative, the Attorney General, the solicitor, or a probation or parole agent, or upon its own motion, *must hold a hearing to require the defendant to show cause why his default should not be treated as a civil judgment* and a judgment lien attached. The court must enter (1) judgment in favor of the State for the unpaid balance, if any, of any fines, costs, fees, surcharges, or assessments imposed; and (2) judgment in favor of each person entitled to restitution for the unpaid balance if any restitution ordered plus reasonable attorney's fees and cost ordered by the court.

(C) The judgments may be enforced as a civil judgment.

(Emphasis added). Thus, S.C. Code Ann. § 17-25-323 recognizes that the ability of the trial court to convert the restitution order into a civil judgment expires at the end of the probationary period. Not only must the motion be filed prior to the end of the probationary period, but a hearing granting or denying the request must be held within the probationary period.

Here, the probation period expired on July 1, 2012, ending the case. There is nothing in the record to support the representation by the probation agent at the September 6, 2013, hearing that probation ended July 8, 2013. Indeed, probation services indicated to the trial court that probation had gone beyond five years. It is obvious from the September 6, 2013, transcript that probation services simply wanted to have an express end to probation, which had already expired by the terms of the Order of Restitution. Furthermore, realizing that there was no longer any "probation" to "revoke" Homeowners attempted to do an end run around the expiration of the probation period by requesting that the trial court impose a civil contempt order with respect to the remaining balance of the restitution amount. However, since the trial court did not have subject matter jurisdiction to revoke Defendant's probation or convert the restitution to a civil judgment, it follows that the trial also did not have

jurisdiction to impose a civil contempt order, even if the parties consented thereto.

2. **The Trial Court Erred in Entering the November 20, 2013, Order After the Defendant Withdrew His Consent.**

On October 3, 2013, counsel for Defendant, S. Harrison Saunders, VI, notified the trial court in writing that the Defendant was now refusing to sign the proposed consent Order based on Defendant's contention that he had not been informed by his legal counsel that the State had to prove that his failure to pay restitution was willful in order to revoke his probation. When the State seeks to revoke probation solely on the basis of failure to pay fines or restitution, a finding of willfulness is mandatory. *State v. Hamilton*, 333 S.C. 642, 649, 511 S.E.2d 511 (S.C. App. 1999). Nevertheless, the trial court signed the Order presented by Homeowners without the signatures of any of the parties. (The Order is undated, but was entered by the Clerk's Office on November 20, 2013)

Although there appears to be no South Carolina law addressing this situation, a North Carolina case found that a court has no authority to enter a judgment based on a consent agreement, even after the terms have been read into the record and the parties were questioned by the trial court, if a party repudiates the agreement by withdrawing consent prior to entry of an order. *Chance v. Henderson*, 518 S.E.2d 780, 784, 134 N.C. App. 657, (N.C. App. 1999). The North Carolina Court of Appeals stated: "If a party repudiates the agreement by withdrawing consent before entry of the judgment, the trial court is 'without power to sign [the] judgment.'" *Id.* (citation omitted.)

In this case, the trial court should have declined to sign the Order after being notified by Defendant's counsel that he no longer consented to the agreement proposed by Homeowners.

3. **The Trial Court Erred in Entering an Order Providing For a Remedy of Civil Contempt.**

Even if the trial court had subject matter jurisdiction in this case, the trial court only had authority to revoke probation under S.C. Code Ann. § 24-21-460 or convert the restitution balance into a civil judgment under S.C. Code Ann. § 17-25-323. By specifying a particular remedy, i.e., revocation or conversion to a civil judgment, South Carolina law excludes the use of other remedies to enforce restitution orders or criminal fines, surcharges, assessments, costs, and fees.

In general, the purpose of civil contempt proceedings is to coerce obedience to a court order. *Checker Yellow Cab Co., Inc. v. Checker Cab and Parcel Service, Inc.*, 287 S.C. 608, 610, 340 S.E.2d 549, 551 (S.C. App. 1985). However, civil contempt proceedings are abated by a final disposition of the cause in which contempt occurred. 287 S.C. at 611, 340 S.E.2d at 551. Therefore, once a criminal defendant's sentence has expired, criminal courts should not continue to act to enforce monetary penalties against defendants. Use of civil contempt to get around this problem is improper and constitutes reversible error. Furthermore, once the trial court ended probation as of September 6, 2013, the State had no more interest in Wright; rather, it was Homeowners (who has a civil judgment against Wright anyway) who sought enforcement through the criminal court of its monetary damages.

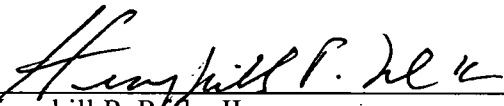
Lastly, it is not apparent that Homeowners, even though a "victim," had standing to seek civil contempt. Contempt is a remedy afforded to a court, not an individual. See *Checker Yellow Cab Co., Inc. v. Checker Cab and Parcel Service, Inc.*, 287 S.C. 608, 610, 340 S.E.2d 549, 551 (S.C. App. 1985). Moreover, contempt requires a specific finding of fact that the party has intentionally failed to obey the court's order.

CONCLUSION

For all of the foregoing reasons, the Appellant requests that the Order entered on November 20, 2013, be vacated as a nullity or reversed on the merits and that no further proceedings be allowed in this case.

Respectfully submitted,

February 7, 2014



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THE STATE,Respondent,

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

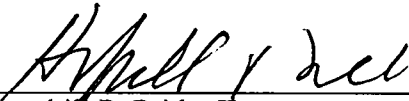
Appellant proposes the following to be included in the Record on Appeal:

1. Plea Agreements for Indictments 2003 GS 40-5502, 5503 and 5504 respectively, entered January 10, 2005
2. Transcript of January 10, 2005, Hearing
3. July 18, 2005, Order of Restitution
4. SCDPPPS Violation Report
5. 2009 Probation violation citation
6. Orders dated May 16, 2009, for Indictments 2003 GS 40-5502, 5503 and 5504
7. 2013 Probation Violation Citation.
8. Transcript of September 6, 2013, hearing,
9. Letter, dated October 3, 2013, from counsel for Defendant, S. Harrison Saunders VI, to the trial court

10. Order entered November 20, 2013
11. November 8, 2013, Notice of Motion and Motion To Reconsider
12. November 26, 2013, Notice of Intent to Appeal in the Court of Appeals
13. January 8, 2014, Homeowner's Motion for Rule to Show Cause

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

February 7, 2014



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