

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable Thomas A. Russo, Circuit Court Judge
Case No. 2013-000491

THE STATE, RESPONDENT

v.

BRIAN E. LORICK, JR., APPELLANT

FINAL BRIEF OF RESPONDENT

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SC Court of Appeals

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S.C. Code Ann. § 24-21-4309

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S.C. Const., Art. 1 § 810

STATEMENT OF ISSUE ON APPEAL

1. The Appellant's appeal should be dismissed because the circuit judge found other grounds with which to violate the Appellant's probation beyond simply violating the "no contact" instruction.

2. The circuit judge did not err in denying counsel's motion to dismiss the probation revocation action because the instruction to have no contact with the victim of the original offense was not a condition added in violation of Stevens.

STATEMENT OF THE CASE

On October 20, 2011, the Appellant Brian Lorick, Jr struck the victim Bethany Leaphart in the head and strangled her with his hands. Lexington County Sheriffs deputies charged him with Criminal Domestic Violence of a High and Aggravated Nature. On June 21, 2012, the Appellant pled guilty to the reduced charge of Assault and Battery 2nd Degree before the Honorable D. Craig Brown. Upon accepting the plea, the Court sentenced Appellant to a term of imprisonment of three years suspended on the service of six months and two years of probation. (R.p.51-p.53).

During his period of probation, the Appellant was served a warrant for having again assaulted the victim of the original charge (R.p.49-p.50). During a non-judicial review of the violation with a supervising agent and the Appellant on September 25, 2012, the Department's response was to instruct the Appellant to no longer have any direct or indirect contact with the victim. The Appellant signed the Form 1182 Notice of Violation and Response which was also signed by the agent and his supervisor

On October 31, 2012, the Department issued another warrant against the Appellant, alleging that the Appellant has had continued contact with the victim in violation of the instructions of the agent. The warrant was also issued in response to allegations by the victim that the Appellant physically assaulted her after the first warrant was issued. (R.p.47-p.48).

The Appellant first appeared before the Honorable Clifton Newman on February 8, 2013 in Lexington County General Sessions Court. He was represented by Robert M. Madsen, who moved to dismiss the probation warrant alleging that the "no contact" instruction was not a judicially-imposed condition of probation. Judge Newman continued the case upon request of the Department, as it was not prepared to argue the motion.

The Appellant then appeared before the Honorable Thomas A. Russo on March 1, 2013. He was again represented by Robert M. Madsen at the hearing, who renewed his motion to dismiss the probation warrant. Judge Russo denied the motion and after a full hearing, revoked Appellant's probation after finding the violations extreme and willful. (R.p.17-p.46).

The Appellant now brings this appeal before this court.

ARGUMENT

The Appellant's appeal should be dismissed because the circuit judge found other grounds with which to violate the Appellant's probation beyond simply violating the "no contact" instruction.

The warrant for violation of probation alleged the Appellant violated his supervision for two reasons: for assaulting the victim and for contacting the victim after being instructed by the agent to have no further contact with her.

During the full hearing on March 1, 2013, the Court conducted a thorough examination of the facts as well as the Appellant's actions after his arrest pursuant to the warrants. Specifically, Appellant continued to contact the victim through letters, many of which included "menacing" language.¹

¹ The Court conducted this exchange with Appellant's counsel:
Mr. Madsen: -- just to back up what Ms. Leaphart is saying, these are excerpts from the many letters that Mr Lorick has written.
The Court: Oh, I know. I'm sitting here reading them.
Mr. Madsen: They're quite menacing, sir.
The Court: They are.
Tr. 26, 19-15

Furthermore, the Court stated noted, “throughout every one of these letters that he writes, it’s clear, he’s adamant, ‘Please do not turn these in. Please keep this away from my agent. Please don’t.’ He’s doing everything in his power to do an end run around Probation – an’t no question about it.” R.p. 43, l. 2-7).

Upon revoking the Appellant’s probation in full, the Court “[found] that the violations are extreme. They are definitely willful.” (R.p. 43, l. 13-14).

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.

“Where the ruling of the trial judge is based on more than one ground, an appellate court must affirm unless the appellant appeals all grounds upon which the ruling was based.” State v. Hicks #3, 387 S.C. 378, 692 S.E.2d 919 (2010).

The petitioner in Hicks challenged only one of three conditions of probation the circuit judge found he violated. The appellate court’s decision regarding the judge’s ruling on the challenged condition was vacated by the Supreme Court because the other two conditions were unchallenged grounds for the revocation.

In the instant case, it is clear from the record that the judge found other grounds for which to find a violation of probation, most notably the referenced letters of the Appellant. These letters, far from just evidence of contact between the Appellant and the victim, were evidence of behavior that was appropriately addressed through revocation. The Court found that the letters were menacing, and that they contained requests that the victim keep the letters away from his probation agent, indicating that the Appellant *knew* that these letters were inappropriate.

Consequently, the circuit court determined Appellant violated his probation for failing to comport himself to the expectations of those given the grace of probation instead of incarceration. Although no condition specifically prohibits repeatedly harassing and sending menacing letters to the victim of the original assault, that the action would be a violation of probation speaks for itself. Again, the fact that the Appellant requested his letters be kept away from his agent further indicates he knew the letters would be a violation of his supervision.

Therefore, the circuit court's decision to revoke Appellant's probation was separate from merely violating the no contact instruction, and not made in an arbitrary or capricious manner. The revocation should not be disturbed.

The circuit judge did not err in denying counsel's motion to dismiss the probation revocation action because the instruction to have no contact with the victim of the original offense was not a condition added in violation of Stevens.

Appellant argues that the circuit judge erred when he refused to dismiss the probation revocation, citing State v. Stevens, 373 S.C. 595, 646 S.E.2d 870 (2007). Stevens holds that the Department may impose conditions upon a probationer that enhances the court-imposed conditions, pursuant to S.C. Code Ann. § 24-21-430. However, it also held that the Department may not add new conditions of supervision.

This issue in Stevens involved an agent placing the offender under GPS monitoring, a condition that he subsequently violated. However, the sentencing court did not impose any form of monitoring as a condition of supervision. Therefore, the probationer could not be violated for failing the GPS program. The Court specifically stated that if the sentencing court had ordered Stevens to "submit to intensive surveillance," then the agency could have imposed GPS monitoring as an enhancement of that condition, and respond with a warrant to violations of that type of monitoring.

Appellant argues that the holding of Stevens should be expanded to an agent's instructions and authority as a supervisor and law-enforcement officer. Such an expansion is untenable.

In the present case, the agent instructed that the Appellant have no contact with the victim of the original assault, after learning that he may have assaulted her again. When the Appellant continued to have contact with the victim, including another alleged assault, the agent responded by issuing a warrant and bringing him before the circuit court.

Probation agents are charged with a unique brand of law enforcement. They are officers that must ensure the safety of the community and encourage the rehabilitation of offenders. “[A probation agent] must use practicable and suitable methods to aid and encourage persons on probation, parole, or community supervision to bring about improvement in their conduct and condition.” S.C. Code Ann. § 24-21-280(A).

This statutory authority to encourage and enforce good behavior in those under supervision is also referenced in several places in the standard conditions of supervision, which are incorporated by reference on every sentence sheet. Condition 10 requires those on probation to “follow the advice and instructions of the agent.” (R.p. 8, l. 20 – p. 11, l. 16). Furthermore, Condition 4 requires the offender “shall not associate with any person who has a criminal record or any person who [the] agent has instructed ... to avoid.” (R.p. 7, l. 15-17).

An instruction by an agent to have no contact with a person, most notably a victim or other individuals such as those with criminal records, falls squarely within an enhancement of existing conditions, and also supports the probation agent’s statutory requirement to “bring about improvement in [the offenders’] conduct and condition.” S.C. Code Ann. § 24-21-280(A).

Appellant also argues that imposing an instruction on an offender like a no contact order violates the separation of powers clause per the South Carolina Constitution Article 1, § 8. The Appellant misapprehends the nature of the instruction, by labeling it as a special condition that must be ordered by the court for it to have any authority. As the Court noted in State v. Archie, 322 S.C. 135, 470 S.E.2d 380 (1996), “the imposition of *sentences* is a judicial function.” Id. at 138, 382 (emphasis added). Black’s Law Dictionary, 7th Ed. defines “sentence” as “[t]he judgment that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer.”

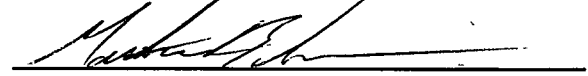
An instruction to have no contact with the victim is not punishment. Unlike the GPS monitoring at issue in Stevens, this instruction is about correcting the Appellant's conduct. A probation agent's statutory duty is to require and enforce improvements in the conduct of those he or she supervises. S.C. Code Ann. § 24-21-280(A).

Consequently, the agent's instruction did not violate the separation of powers by requiring the Appellant to have no further contact with the victim of his original offense.

CONCLUSION

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

Respectfully submitted,



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February 6, 2014

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR and with the South Carolina Supreme Court's order dated August 13, 2007.



Matthew C. Buchanan
General Counsel

February 6, 2014

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Department of Probation, Parole and Pardon Services

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February 11, 2014

The Honorable Jenny Kitchings
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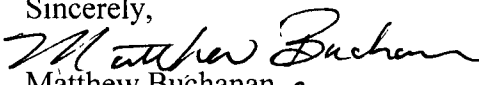
RE: State v. Brian Lorick

Dear Ms. Kitchings:

Enclosed please find the original and nine (9) copies of the Final *Brief of Respondent*, along with proof of service in the above-referenced case.

Thank you for your cooperation in this matter.

Sincerely,


Matthew Buchanan
General Counsel

MCB:dn

Enclosures

cc: Brian Lorick, Esquire

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CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent* dated February 6, 2014, on Appellant this 11th day of February, 2014, by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Wanda Carter, Esquire
S.C. Commission on Indigent Defense
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I further certify that all parties required by Rule to be served have been served.

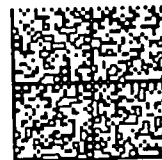


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