

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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FEB 21 2014

SC Court of Appeals

Appeal from York County

John C. Hayes, III, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

FRED COLE, JR.,

APPELLANT

APPELLATE CASE NO. 2013-001139

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ANDERS BRIEF OF APPELLANT

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ROBERT M. DUDEK  
Chief Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR APPELLANT

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## **TABLE OF AUTHORITIES**

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### **STATEMENT OF ISSUE ON APPEAL**

Whether the court erred by revoking appellant's probation without a finding that his failure to provide a home address and report were willful violations where record shows appellant had no steady place to live, and that he tried to report?

### STATEMENT OF THE CASE

Appellant was indicted at the February 16, 2012 term of the York County Grand Jury for the offense of possession with intent to distribute cocaine. R. 11. He was sentenced by the Honorable John C. Hayes, III on April 12, 2012 to one year imprisonment suspended upon one year of probation. R. 13. A probation violation arrest warrant was issued on December 3, 2012, alleging appellant did not provide a permanent address and had failed to report. R. 14.

Appellant appeared on May 20, 2013 for a probation revocation hearing before Judge Hayes. Toni Johnson represented appellant. Probation Agent Shannon Myers represented the state. R. 1.

At the conclusion of the revocation hearing Judge Hayes revoked appellant's probation and ordered that it run concurrent with the time he was serving from an apparent family court contempt order. R. 7, l. 15- 9, l. 2

This appeal follows.

## ARGUMENT

The court erred by revoking appellant's probation without a finding that his failure to provide a home address and report were willful violations where record shows appellant had no steady place to live, and that he tried to report.

### **Relevant Facts**

Judge Hayes noted at the beginning of the revocation hearing that the probation agent had stated appellant had moved without notifying the agent. Appellant acknowledged that was true, but his attorney argued appellant did not have any permanent place to live: "He's kind of been living pillar to post in reference to that." R. 4; l. 21 – 5, l. 22.

Defense counsel Johnson also said that appellant did report in July and spoke with an agent because "at the time his agent was not in . . ." R. 5, ll. 10 -14. The judge said violations were "substantial," and he revoked appellant's probation. The judge did not make any findings regarding whether appellant's inability to have a permanent address or his failure to report after his probation agent was not in were willful violations or whether they were circumstances beyond his control.

### **Discussion**

In State v. Garrard, 390 S.C. 146, 700 S.E.2d 269 (Ct. App. 2010), this Court found the defendant's legal presence within one thousand feet of a school did not constitute a willful violation of his community supervision program. The Court found the defendant did not knowingly and willingly violate the conditions of his probation. The Court noted the trial judge repeatedly asked the probation officer representing the state whether the violation was willful. The officer never gave a direct answer to the question and stated he was leaving the matter to the judge's discretion.

Here, the court did not inquire at all whether the violations were willful even though defense counsel told the judge appellant was living “pillar to post,” and that he had reported in July 2012 but his agent was not there to see him report.

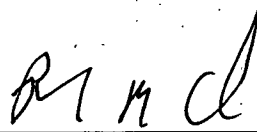
Although the alleged probations violations were not monetary ones in this case, it is generally accepted that the probationer should not have his probation revoked for circumstances that are simply beyond his control. See State v. Spare, 374 S.C. 264, 647 S.E.2d 706 (2007); Barlet v. State, 288 S.C. 481, 343 S.E.2d 620 (1986); Cf. State v. Hamilton, 333 S.C. 642, 511 S.E.2d 94 (1999).

Appellant’s probation violations in this case were not willful. The court did not make any inquiry of appellant about the circumstances of the violations even though his defense counsel offered reasons why the violations were not willful. The judge erred by revoking appellant’s probation under these circumstances.

CONCLUSION

By reason of the foregoing argument, the revocation of appellant's probation should be vacated.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of February, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

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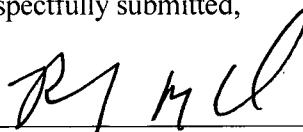
SC Court of Appeals

Counsel for Fred Cole Jr. states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's probation revocation hearing before Judge John C. Hayes, III, which was held on May 20, 2013, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Fred Cole Jr.

Respectfully submitted,



Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of February, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

John C. Hayes, III, Circuit Court Judge

THE STATE,

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FRED COLE, JR.,

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APPELLATE CASE NO. 2013-001139

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

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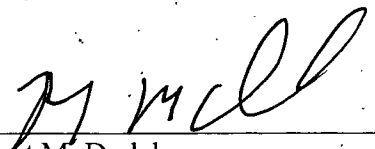
SC Court of Appeals

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

- (1) True-billed indictment;
- (2) Probation Revocation Hearing transcript
- (3) Sentencing Sheet
- (4) Probation arrest warrant

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

February 21st, 2014

  
Robert M. Dudek  
Chief Appellate Defender

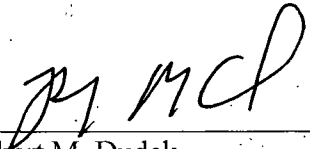
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

February 21, 2014

  
Robert M. Dudek  
Chief Appellate Defender

S.C. Commission on Indigent Defense  
Division of Appellate Defense  
1330 Lady Street, Suite 401  
Post Office Box 11589  
Columbia, South Carolina 29211-15

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**SC Court of Appeals**

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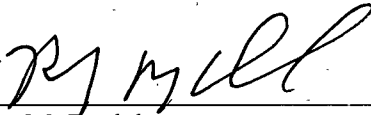
FRED COLE, JR.,

APPELLANT

APPELLATE CASE NO. 2013-001139

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Matthew Buchanan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Fred Cole, Jr., #355520 at Walden Correctional Institution, this 21st day of February, 2014.

  
Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 21st day of February, 2014.

\_\_\_\_\_(L.S.)  
Notary Public for South Carolina  
My Commission Expires: October 24, 2021.

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