

STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
Court of General Session

The Honorable Carmen T. Mullen, Circuit Court Judge

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Appellate Case Number 2013-002401

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The State,.....Respondent  
v.  
Tonja McAllister,.....Appellant

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INITIAL BRIEF OF APPELLANT

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FEB 25 2014

**SC Court of Appeals**

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STATEMENT OF THE ISSUE ON APPEAL

**DID THE TRIAL COURT ERR IN REVOKING APPELLANT'S PROBATION  
BASED UPON HER NON-WILLFUL FAILURE TO PAY RESTITUTION?**

STATEMENT OF FACTS

According to the Indictment underlying Appellant's probation case, the Appellant committed a Breach of Trust by converting \$66, 610.58 of her employer's funds to her own use. Indictment 2008-GS-07-00248. After being placed upon probation, the Appellant then paid \$17,525.00 in restitution. Probation Violation Report. The Appellant complied with all non-monetary obligations of probation during five years of probation. Probation Violation Report.

STATEMENT OF THE CASE

On March 28, 2008, the Appellant was indicted for Breach of Trust, greater than \$10,000.00. Indictment 2008-GS-07-00248. She pled guilty to this charge on October 27, 2008.<sup>1</sup> Sentencing Sheet for Indictment 2008-GS-07-00248. She was sentenced to five years incarceration, suspended to five years of probation and the payment of \$58,097.50 in restitution.

On October 15, 2013, the Appellant was charged with a violation of probation for non-payment of restitution. Probation Citation C-07-13-0023. A probation hearing was conducted on October 24, 2013, the Honorable Carmen T. Mullen presiding. Probation Revocation Hearing Transcript. The trial court revoked her probation and ordered the service of 2 years of incarceration. Probation Violation Order.

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<sup>1</sup>The transcript for this plea and sentencing hearing is no longer available.

The Appellant requested reconsideration of the Court's Order by motion filed on October 31, 2013. Motion to Reconsider Probation Revocation. The trial court declined to conduct a hearing regarding this reconsideration request. Order Denying Motion To Consider Probation Revocation. The trial court also declined to reconsider the Probation Violation Order. Order Denying Motion to Reconsider Probation Revocation.

On November 5, 2013, the Appellant filed a Notice of Appeal. Notice of Appeal. Thereafter, undersigned counsel was retained and the Appellant was released upon the posting of an Appeal Bond. Order Specifying Methods and Conditions of Release. This brief follows.

#### STANDARD OF REVIEW

An appellate court reviewing the revocation of probation is confined to the correction of errors of law unless the record's lack of a legal or evidentiary basis for the revocation indicates arbitrary or capricious actions by the trial court. State v Spare, 647 SE2d 706, at 708 (SC Ct App 2007).

#### ARGUMENT

#### **THE TRIAL COURT ERRED IN REVOKING APPELLANT'S PROBATION BASED UPON HER NON-WILLFUL FAILURE TO PAY RESTITUTION.**

The trial court erred in revoking Appellant's probation based upon a non-willful failure to pay restitution. While the trial court's order appropriately converted the remaining restitution to a civil judgement, the portion of the court's order revoking probation should be reversed. Because the Appellant has served the maximum time on probation, the portion of the trial court's order terminating probation should remain in effect.

The seminal case involving the propriety of incarceration for non-willful failure to pay restitution in a probation setting is the US Supreme Court's opinion in Bearden v Georgia. 461 US 660 (1983). In Bearden, the Court reviewed a Georgia state court's decision to revoke probation for non-payment of a fine and restitution. The Georgia Court of Appeals had affirmed the trial court's revocation order. Bearden.

In reversing the probation revocation, the US Supreme Court held that a sentencing court could not revoke probation solely on the basis of non-payment absent evidence and findings that the non-payment was willful or that alternate forms of punishment were inadequate to meet the State's interest in punishment and deterrence. Bearden at 672-673.

In a situation analogous to the case at bar, the South Carolina Court of Appeals applied the Bearden holding in a case entitled State v Spare. Spare, 647 SE2d 706 (SC Ct App 2007). Spare's probation was revoked solely on the basis of non-payment of restitution. Spare, 707-708. Applying Bearden, the SC Court of Appeals reversed the revocation and remanded the matter to the circuit court for a new probation violation hearing. Id., at 709.

Supporting its ruling, the Court noted the significant efforts of the Appellant to make his required restitution payments. Further, the Court referenced the probation agents apparent agreement that the Appellant's efforts to comply were genuine. Finally, the Court noted that absent "a specific accounting of Spare's total earnings, living expenses, other sources of income, and potential earning capacity, it is difficult to conclude that he had the ability to pay more toward his restitution but made a voluntary, conscious, and intentional decision not to pay." Spare at 709.

In the case at bar, the Appellant was cited for a probation violation based solely upon the non-payment of restitution. Transcript, p 6, l. 3-4. Like the defendant in Spare, the Appellant's conviction caused her significant problems with unemployment and underemployment. Transcript, p 5, l 22-25 & Motion to Reconsider Probation Revocation, p 1. Despite these economic restrictions, the Appellant actually paid \$17,525.00 of restitution during her five years of probation. Probation Violation Report & Motion to Reconsider Probation Revocation.

The trial court made no specific finding regarding the willfulness or lack thereof of Appellant's non-payment. In fact, while initially expressing concern about the Appellant losing her job, the court later based her revocation, in part, upon "...all the probation violations that I've been seeing today and monetary problems..." Transcript p 6, l. 24- p. 7, l. 3 & p 8, l. 3-4. Further, the trial court expressed that no options, besides, revocation existed.

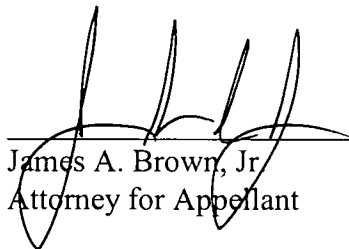
Instead, the trial court expressed disdain for sentencing judges who "... have these people that owe these great amounts of money, that we know people have to be able to pay back, and we should just put them in prison on the front end." Transcript, p 8, l. 5-8. Ironically, the trial court judge who revoked the Appellant's probation is the very same judge who found probation appropriate at the sentencing five years earlier. Sentencing Sheet for Indictment Number 2008-GS-07-00248. Returning to the Appellant's case, the trial court continued by stating: "You know, I mean, unfortunately, you know, again, that's all I can do." Transcript, p 8, l. 8-10. This analysis violates the holding in Bearden. Again, the trial court never made a finding regarding the willfulness of non-payment. Further, the trial court did not consider the alternative of termination of

probation without revocation nor discuss whether revocation was necessary to address the State's interest in punishment or deterrence.

Finally, the trial court's statements concluded by indicating that the Appellant could purge herself of incarceration "if, for any reason, money falls from the sky, and she is able to pay off the balance of it, she can, obviously, get out." Transcript, p 8, l. 23-25. Inapposite to Bearden, this statement likens the trial court's ruling to a finding of civil contempt. And this statement confirms the trial court's neglect of its obligation to determine whether Appellant's non-payment was willful.

#### CONCLUSION

Therefore, this Court should reverse the portion of the trial court's ruling which revokes probation while leaving intact the portion of the ruling converting the remaining restitution to a civil judgement and terminate the remainder of any probation obligation.

  
James A. Brown, Jr.  
Attorney for Appellant

February 21, 2014  
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APPELLANT'S DESIGNATION OF  
MATTER TO BE INCLUDED IN THE  
RECORD ON APPEAL

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

1. Warrant Number I-260686
2. Indictment Number 2008GS07-00248
3. Sentence Sheet
4. Notice of Probation/CSP Violation Hearing and Acknowledgment of Notice
5. Victim Notification Letter
6. Affidavit of Indigency
7. Order - Appointment of Counsel
8. Probation Citation Number C-07-13-0023
9. Probation Violation Report

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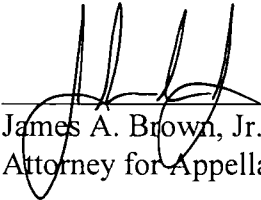
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**SC Court of Appeals**

10. Probation Violation Order
11. Transcript of Probation Revocation Hearing, dated October 24, 2013
12. Motion to Reconsider Probation Revocation
13. Order Denying Motion to Reconsider Probation Revocation
14. Notice of Intent to Appeal, dated 11/5/13
15. Affidavit of Service
16. Letter from Court of Appeals to Jessica Saxon dated 11/14/13
17. Letter to Court of Appeals from Jessica Saxon dated 11/25/13
18. Notice of Intent to Appeal, dated 11/25/13

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

February 21, 2014

  
\_\_\_\_\_  
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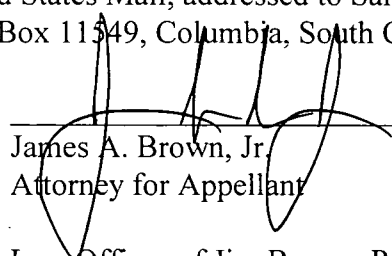
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PROOF OF SERVICE

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Counsel for Tonja McAllister hereby certifies that he has prepared and served an Initial Brief of Appellant and Designation of Matter on this 21<sup>st</sup> day of February, 2014, upon the State, by depositing a copy, postage pre-paid, in the United States Mail, addressed to Salley W. Elliott, South Carolina Office of the Attorney General, PO Box 11549, Columbia, South Carolina, 29211.

February 21, 2014

  
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**SC Court of Appeals**

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February 21, 2014

The Honorable Jenny Abbott Kitchings  
Court of Appeals  
PO Box 11629  
Columbia, South Carolina 29211

RE: Tonja McAllister v. State of South Carolina  
Appellate Case No. 2013-002401

Ms. Kitchings:

Under cover of this letter, find enclosed a copy of the Appellant's Initial Brief, Certificate of Counsel, Designation of Matter to be Included in Record on Appeal and the Proof of Service with regard to the same. Thank you for your assistance with this matter.

Sincerely,



Jim Brown

with enclosures as indicated above

cc: Salley W. Elliott, Sr. Asst. Deputy Attorney General, w/enclosures  
Tonja McAllister, w/enclosures

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**SC Court of Appeals**