

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

RECEIVED
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SC Court of Appeals

THE STATE,Respondent,

v.

JOSEPH WRIGHT, JR.,Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On January 10, 2005, Joseph Wright, Jr., pled guilty to financial identify 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, respectively. (R. , Plea Agreements for Indictments 2003 GS 40-5502, 5503 and 5504, respectively). The State was represented at the January 10, 2005, hearing by Robert J. Elam, Richland County Solicitor's Office, Attorney for the State. (R. , January 10, 2005, hearing transcript.)

On July 18, 2007, the trial court entered an Order of Restitution, which was consented to by Robert J. Elam, Richland County Solicitor's Office, which provided that probation would end July 1, 2012. (R. , July 18, 2007 Order of Restitution).

On May 15, 2009, the trial court conducted a probation revocation hearing which modified the terms of the Order of Restitution, which provided in part that "SCDPPPS is released from obligation of collecting restitution. Rest. Acct. to be removed from SCDPPPS. Recommend waive sup. fee - and exempt SF arrearages convert fine to civil judgment." That Order was signed by Wright before a witness "Condie W. Johnson, Jr." (R. , May 15, 2009 Order) (See Exhibit A attached to this Brief). Wright relied on that version of the May 15, 2009, Order in preparing the Initial Brief of Appellant; however, in preparing the record, Wright obtained copies of the documents directly from the Clerk of Court for Richmond County.

It has now come to Wright's attention after the DPPP submitted additional documents in its "Designation of Matter" that the filed version of the May 15, 2009, Order, has additional language added to the Order, in particular, that "Probation begin date is 7/9/09 extend 5 years from that date." DPPP Designation on Appeal, attachment 1, page 1. (See Exhibit B attached to this Brief).

On May 21, 2013, South Carolina Department of Probation, Parole and Pardon Services [“DPPP”] issued and served a citation on Defendant/Appellant for failure to pay the remaining balance of the Restitution Order 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. At the hearing, the trial court terminated probation as of that date and the terms of a consent agreement concerning a civil contempt order were recorded. (R. September 6, 2013, hearing transcript, p. 9, lines 17-23, p. 10, lines 17-25, p. 11, lines 1-13). On October 3, 2013, counsel for Wright notified the trial court that the Defendant was withdrawing his consent 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 Mortgage Enterprise [“Homeowners”] without the signatures of Homeowners or Wright or Wright’s attorney. (The Order is undated, but was entered by the Clerk’s Office on November 20, 2013). (R. , Order entered November 20, 2013).

On November 26, 2013, Wright filed a Notice of Intent to Appeal to the South Carolina Court of Appeals and served a copy on Daniel E. Johnson, Solicitor for the Fifth Judicial Circuit. (R. , Notice of Appeal dated November 26, 2013).

On February 7, 2014, Wright filed his Initial Brief of Appellant in the South Carolina Court of Appeals and served Daniel E. Johnson, Solicitor for the Fifth Judicial Circuit. The Respondent, State of South Carolina, had until March 12, 2014, to file a Response Brief under S.C. Rules of Appellate Procedure, Rule 208 (a)(2); however, the Respondent has not done so.

On March 28, 2014, Matthew C. Buchanan, Esq., General Counsel for DPPP, sent a letter to the Honorable Jenny Abbott Kitching, Clerk of the S. C. Court of Appeals, from which reads, in pertinent part:

. . . Respondent [Department of Probation, Parole and Pardon Services] respectfully requests that the Court allow Respondent additional time in order to be served with the Initial Brief and be allowed time to file an Initial Brief of Respondent.

(R. , letter dated March 28, 2014 from Matthew C. Buchanan to Honorable Jenny Abbott Kitching)

On March 31, 2014, counsel for Wright, Hemphill P. Pride II, Esq., sent a letter to the Honorable Jenny Kitchings which reads, in pertinent part:

. . . As evidenced by the Hearing Transcript of September 6, 2013 in the matter of *State v. Joseph Wright* . . . the [South Carolina] Department [of Probation, Parole and Pardon Services] was not served because it is not a party to this matter.

(R. , letter dated March 31, 2014, from Hemphill P. Pride II, Esq., to the Honorable Jenny Kitchings).

On April 03, 2014, Deputy Clerk V. Claire Allen sent a letter to counsel for Wright, Hemphill P. Pride II, Esq., which reads, in pertinent part:

. . . Please serve a copy of your appellant's initial brief and designation of matter upon Mr. Matthew Buchanan and provide a correct proof of service to this Court within ten (10) days of the date of this letter.

On April 4, 2014, Wright served a copy of his Initial Brief of Appellant upon Matthew C. Buchanan, Esq., General Counsel for DPPP.

On April 30, 2014, DPPP filed and served a document entitled "Initial Brief of Respondent." along with request for "Designation of Matter to be Included in the Record on Appeal."

ARGUMENT

I. **DPPP's Initial Brief of Respondent and Designation of Matter should be stricken because DPPP is not a party to this case and did not intervene in the trial court.**

Rule 201(b), SCACR provides: "Only a party aggrieved by an order, judgment, sentence or decision may appeal." The South Carolina Department of Probation, Parole and Pardon Services ["DPPP"] was not a party to the underlying criminal action and has never moved to intervene as a party. The style of this case has remained the same throughout this proceeding. The DPPP is not the State and may not simply unilaterally substitute itself for the State in this case.

S.C. Code Ann. § 17-1-10 provides: "A criminal action is prosecuted by the State, as a party, against a person charged with a public offense, for the punishment thereof." S.C. Code Ann. § 24-21-280(B) provides that ". . . A probation agent has the power and authority to enforce the criminal laws of the State. In the performance of his duties of probation, parole, community supervision, and investigation, he is regarded as the *official representative of the court, the department [of PPP], and the board [of the DPPP].*" (Emphasis added) However, that statute does not make the DPPP the representative of the State or render the DPPP synonymous with the State.

In *Ex parte Condon*, 354 S.C. 634, 642, 583 S.E.2d 430 (S.C. 2003), a plaintiff class filed suit against the State of South Carolina and the Department of Revenue. The parties reached a settlement agreement and the circuit court gave preliminary approval to the settlement terms. At that point, the Attorney General filed objections to the award of attorneys' fees in the settlement agreement. Nevertheless, the circuit court gave final approval to the settlement agreement. The Attorney General then filed a notice of appeal from the order awarding attorneys' fees and costs. The Respondents filed a motion to dismiss for lack of standing of the Attorney General to appeal. The Supreme Court denied the motion to dismiss without prejudice to the Respondents' right to argue the issue in their

brief. Subsequently, the Supreme Court held that the Attorney General could not file an appeal without first intervening in the trial court proceeding. 354 S.C. at 642. The Supreme Court found that, notwithstanding the Attorney General's statutory authority under S.C. Code Ann. § 1-7-40 to appear for the State, the Attorney General was not a party to the action as filed. The Supreme Court rejected the Attorney General's argument that because the State and Department of Revenue were already parties to the action, the Attorney General could "automatically 'appear' for the State." 354 S.C. at 641.

Likewise, in *Ex Parte South Carolina Dep't of Motor Vehicles v. State*, 390 S.C. 457, 458, 702 S.E.2d 568 (S.C. 2010), the Supreme Court dismissed an appeal filed by the South Carolina Department of Motor Vehicles ["SCDMV"] because the SCDMV was not a party to the case. In that case, a citizen/driver filed suit in the circuit court for a driver's license. The relevant statute required the citizen/driver to serve the State through the Solicitor's Office. The State did not object to the petition, and the trial court granted relief. After the Order was presented to the SCDMV, the SCDMV filed motions to reconsider under SCRPC Rule 59, but did not move to intervene in the case. The motions were denied and the SCDMV filed a notice of appeal "and attempted to portray itself as a party. In its notice, SCDMV unilaterally and without court authorization changed the caption from *Don C. Gillespie v. State of South Carolina* to *Don C. Gillespie v. South Carolina Department of Motor Vehicles*." 390 S.C. at 457. In rejecting the appeal, the Supreme Court stated "A well-known rule of appellate procedure is that only an aggrieved party may appeal. Rule 201(b), SCACR; see also *Condon v. State*, Having failed to intervene as a party, SCDMV's appeal is dismissed." *Id.*

Here, the State is represented by the Solicitor's Office and is the Respondent (which has elected not to participate in this appeal). The DPPP never moved to intervene as a party in the trial

court. As in *Ex Parte Condon v. State* and *Ex Parte South Carolina Dep't of Motor Vehicles v. State*, just because the State is a party and the Respondent in this appeal, that does not automatically give the DPPP the right to appear in this case as the State or on behalf of the State. Wright served the DPPP with a copy of his Initial Brief of Appellant under protest.

Furthermore, the trial court ruled that Wright's probation terminated on September 6, 2013.¹ In fact, the DPPP states that "Indeed, it even appears that the Department's involvement regarding Appellant's restitution requirement had been ended with the May 15, 2009 Order." Initial Brief of Respondent [DPPP], page. 8. The Order appealed from was entered November 20, 2013. Thus, the DPPP itself admits in its own brief that its involvement in the case probably ended on May 15, 2009, but in any event at the latest on September 6, 2013, well before the Order entered November 20, 2013, which is the subject of this appeal.

A criminal proceeding should not be a "free for all" for non-parties to appear at the appellate stage and submit briefs and evidence. It bears repeating that S.C. Code Ann. § 17-1-10 provides: "A criminal action is prosecuted by the State, as a party, against a person charged with a public offense, for the punishment thereof." Tellingly, the State, represented by the Solicitor's Office in this case, has not submitted a brief or participated in any way in this appeal. It would be against public policy to open criminal proceedings at the appellate level to entities that did not appear as parties in the trial court. Otherwise, the State's exclusive role to "prosecute[]" would be infringed. The purpose of appeal is to consider and correct, if necessary, issues raised at the trial court level by the named parties, hence the rationale for Rule 201(b).

¹ Furthermore, the DPPP expressly states that it "does not have standing to put forth an argument" with respect to the second and third enumeration of errors raised by Defendant/Appellant. Initial Brief of Respondent [DPPP], page. 8

II. The extension of the end date of the probation period from July 1, 2012, to July 9, 2013, is invalid because it was not included on the copy of the May 15, 2009, Order at the time Wright signed it.

On May 15, 2009, the trial court conducted a probation revocation hearing which modified the terms of the Order of Restitution, which provided in part that “SCDPPPS is released from obligation of collecting restitution. Rest. Acct. to be removed from SCDPPPS. Recommend waive sup. fee - and exempt SF arrearages convert fine to civil judgment.” That Order was signed by Wright before a witness “Condie W. Johnson, Jr.[Signature not clear]” (R. , May 15, 2009 Order) (See Exhibit A attached to this Brief). Wright’s counsel relied on that version of the May 15, 2009, Order in preparing the Initial Brief of Appellant. However, in preparing the record for appeal, Wright’s counsel obtained copies of the documents directly from the Clerk of Court for Richmond County.

It has now come to Wright’s counsel’s attention after the DPPP submitted additional documents in its “Designation of Matter” that the filed version of the May 15, 2009, Order, has additional language added to the Order, in particular, that “Probation begin date is 7/9/09 extend 5 years from that date.” DPPP Designation on Appeal, attachment 1, page 1. (See Exhibit B attached to this Brief).

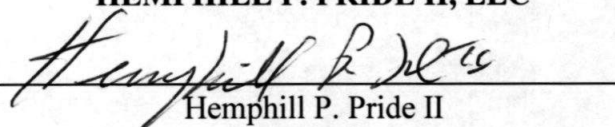
DPPP argues that, based on the filed version of the May 15, 2009, Order, the probation period was extended to July 9, 2013; therefore, because the probation citation was issued on May 21, 2013, the trial court retained subject matter jurisdiction to revoke probation. However, DPPP’s Brief shows that DPPP is merely speculating about possible grounds for tolling the probation period after the July 18, 2007, Restitution Order, which specified a July 1, 2012, end date for probation. Also, there is no explanation as to why Wright was given a version of the May 15, 2009, Order to sign without the

language pertaining to the extended period of probation to July 9, 2013.

Accordingly, after the probationary period expired on July 1, 2012, the trial court lacked subject matter jurisdiction to revoke probation. *State v. Crouch*, 355 S.C. 355, 359, 585 S.E.2d 288 (S.C. 2003). Any proceedings after July 1, 2012, were a nullity.

CONCLUSION

For all of the foregoing reasons, the Appellant requests that the South Carolina Department of Probation, Parole and Pardon Services “Initial Brief of Respondent” and “Designation of Matter” be stricken from this case, that Homeowners’ Motion to Intervene be denied, and 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.

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May 12, 2014

ATTORNEY FOR APPELLANT

AGDC

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

County of Richland
STATE VS.

INDICTMENT#:
03 -GS- 40 - 5301
Probation C/W#s: W-40-08 7191

AKA: _____
Race: Blk Sex: M
DOB: 7/12/19
SSN: 25153-793
SID#: 71053

Name of Original Offense: _____
Original A/W#: 6-84543
Date of Original Offense: 11/29/01
Conviction S.C. Code §: 16-13-510
Conviction CDR Code #: 2 / 6 / 1 / 1
Original Sentence: 1 yr 9 mo 60 days

ORDER

The above named defendant has been charged with violating the conditions of probation ordered on 1/10/08 in the Court of General Sessions of Richland County, and/or the additional conditions ordered by the Court in probation continuation orders(s) issued on _____, as set forth in the attached warrant(s) or citation(s) dated _____. After hearing the evidence and being duly advised, in the (presence/absence) of the defendant, I find that the above named defendant has violated the following condition(s) of probation: (List by number or indicate special conditions as provided in the affidavit)
16-13-510 special condition

Therefore, IT IS ORDERED that:

the suspended sentence be revoked and the above named defendant be required to serve _____ months/years, the remainder of the original sentence, and/or pay \$ _____.

the suspended sentence be revoked and the above named defendant be required to serve 20 DAYS (WEEKEND TIME) months/years of the original sentence and/or pay \$ _____; thereupon to be reinstated on probation, subject to the conditions set forth in the attached order and not inconsistent with this order.
TO BEGIN 5/16/09 - CONSECUTIVE WEEKENDS

the above named defendant is continued on probation as provided for in the original sentence, subject to the conditions set forth therein and not inconsistent with this order.

probation is reduced to time served under supervision and the defendant is discharged from supervision on this date.

the above named defendant is placed on active electronic monitoring pursuant to §23-3-540 (mandatory if convicted of first degree criminal sexual conduct with a minor or lewd act, discretionary if convicted of any other applicable sex offense against a minor).

Additional Conditions ordered by the Court: pay \$5000.00 on restitution today. pay \$1875.00 in June 2009. pay \$1875.00 in July 2009. Payments to be made directly to Attorney Bob Wood. SCAPPS IS RELEASED FROM obligation of collecting Restitution. Rest. Acc't to be removed from SCAPPS

The defendant is given credit for pre-revocation hearing detention time on current probation violation to be calculated and applied by the SC Department of Corrections.
RECOMMENDATIVE SUP. FEE - AND EXEMPT SF ARREST FEE. CONVERT FINE TO CIVIL JUDGMENT

The defendant has previously served 10 months/years on this sentence.
(split sentence time and/or prior partial revocation time)

The defendant was previously placed on active electronic monitoring pursuant to §23-3-540.

This 15 day of MAY, 2009,
Columbia, SC

Presiding Judge 511 S. DICKSON
Judicial Circuit

You are hereby advised that under the law the Court may at any time revoke or modify any condition of this probation; impose any lawful conditions it deems proper; or extend your period of probation not to exceed five (5) years. At any time within the period of your probation, the Court may require you to serve any part of the original sentence imposed.

This is to certify that I have read, or have had read to me, the order and the conditions set out therein. I agree to comply with such conditions and the conditions of my attached probation order during the period of my probation. I have received a copy of this Court's order and all attachments.

Offender's Signature _____

EXHIBIT A

Witnessed by Carlie W. Johns Jr

Signed this 15 day of May, 2009 at _____
Day Month Year

Columbia SC

Volume 1261

AGDC (TIME)
(WEEKEND TIME) IN THE COURT OF GENERAL SESSIONS
INDICTMENT#:

County of Richland
STATE VS.

03 -GS- 40 - 5502
Probation C/W#s: W-40-08-7190

Joseph Wright Jr.
AKA:
Race: Blk Sex: M
DOB: 7/13/68
SSN: 251-53-0793
SID#: 710835

Name of Original Offense:
Original AW#: G-845443
Date of Original Offense: 11/29/01
Conviction S.C. Code §: 16-13-510
Conviction CDR Code #: 2181113
Original Sentence: 1 yr, 55 on weekends; 3 yrs. Probat.

ORDER

The above named defendant has been charged with violating the conditions of probation ordered on 11/10/05 in the Court of General Sessions of Richland County, and/or the additional conditions ordered by the Court in probation continuation order(s) issued on 2008, as set forth in the attached warrant(s) or citation(s) dated July 14, 2008. After hearing the evidence and being duly advised, in the (presence/absence) of the defendant, I find that the above named defendant has violated the following condition(s) of probation: (List by number or indicate special conditions as provided in the affidavit)
1, 2, 3, 7, 9, 10, 11 - Special Conditions

Therefore, IT IS ORDERED that:

- the suspended sentence be revoked and the above named defendant be required to serve _____ months/years, the remainder of the original sentence, and/or pay \$ _____.
- the suspended sentence be revoked and the above named defendant be required to serve 20 DAYS (WEEKEND TIME) of the original sentence and/or pay \$ _____; thereupon to be reinstated on probation, subject to the conditions set forth in the attached order and not inconsistent with this order. TO BEGIN 5/16/09 - CONSECUTIVE WEEKENDS
- the above named defendant is continued on probation as provided for in the original sentence, subject to the conditions set forth therein and not inconsistent with this order.
- probation is reduced to time served under supervision and the defendant is discharged from supervision on this date.

the above named defendant is placed on active electronic monitoring pursuant to §23-3-540 (mandatory if convicted of first degree criminal sexual conduct with a minor or lewd act, discretionary if convicted of any other applicable sex offense against a minor).
Additional Conditions ordered by the Court: MONTHLY PAYMENTS OF \$1875 ON RESTITUTION THROUGHOUT SUPERVISION. PAY \$5000. ON RESTITUTION TODAY. PAY \$1875. IN JUNE 2009. PAY \$1875. IN JULY 2009. PAYMENTS TO BE MADE DIRECTLY TO ATTORNEY BOB WOOD. SCOPPPS IS RELEASED FROM OBLIGATION OF COLLECTING RESTITUTION. REST. ACCT TO BE REMOVED FROM SCOPPPS.

The defendant is given credit for pre-revocation hearing detention time on current probation violation to be calculated and applied by the SC Department of Corrections. RECOMMEND WAVE SUP. FEES AND EXEMPT ST APPEARANCE. CONVERT FINE TO CIVIL JUDGEMENT. PROBATION BEGIN DATE IS 5/19/08. F. SP. 5 YEARS FROM DATE.

The defendant has previously served 0 months/years on this sentence. (split sentence time and/or prior partial revocation time)

The defendant was previously placed on active electronic monitoring pursuant to §23-3-540.

This 15 day of MAY, 2009
Columbia, SC

[Signature]
Presiding Judge
[Signature]
Judicial Circuit I

You are hereby advised that under the law the Court may at any time revoke or modify any condition of this probation; impose any lawful conditions it deems proper, or extend your period of probation not to exceed five (5) years. At any time within the period of your probation, the Court may require you to serve any part of the original sentence imposed.

This is to certify that I have read, or have had read to me, the order and the conditions set out therein. I agree to comply with such conditions and the conditions of my attached probation order during the period of my probation. I have received a copy of this Court's order and all attachments.

Offender's Signature [Signature]

Witnessed by [Signature]

Signed this 15 day of May, 2009 at _____ City

