

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable Clifton Newman, Circuit Court Judge
Case No. 2013-000811

JUN 09 2014

THE STATE, RESPONDENT

v.

JONATHAN MALLORY, APPELLANT

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Table of authorities	3
Statement of issue on appeal	4
Statement of the case	5
Argument	
The circuit judge did not err by revoking Appellant's probation for failure to adhere to his statutory probation conditions, which included the requirement that he be current on payments regardless of his probation agent's general statements concerning the appellant's efforts to meet his financial obligations since the judge's finding that the appellant's violations were "willful" is supported by the record	6
Conclusion	12

TABLE OF AUTHORITIES

CASES

<u>Barlet v. State</u> , 288 S.C. 481, 343 S.E.2d 620	10
<u>Bearden v. Georgia</u> , 461 U.S. 660, 103 S.Ct. 2064 (1983)	10
<u>State v. Allen</u> , 370 S.C. 88, 94, 634 S.E.2d 653, 655 (2006).	8
<u>State v. Hamilton</u> , 333 S.C. 642, 511 S.E.2d 94 (1999)	8,10
<u>State v. Hawkins</u> , 2008 WL 9841738 (S.C. App.)	9,10
<u>State v. Spare</u> , 374 S.C. 264, 647 S.E.2d 706 (2007)	10
<u>U.S. v. Burton</u> , 155 Fed. Appx. 92, 2005 WL 3105681 (C.A.4 (Md.))	11
<u>U.S. v. Dixon</u> , 187 F.Supp.2d 601 (S.D.W.Va., 2002)	9

STATUTES

S.C. Code Ann. §24-21-80	5,7
S.C. Code Ann. § 24-21-430	5,6,7,11
S.C. Code Ann. § 24-21-420	11

RULE

S.C. Evid. Rule 801(d)(2)(B)	10
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STATEMENT OF ISSUE ON APPEAL

The circuit judge did not err by revoking Appellant's probation for failure to adhere to his statutory probation conditions, which included the requirement that he be current on payments regardless of his probation agent's general statements concerning the appellant's efforts to meet his financial obligations since the judge's finding that the appellant's violations were "willful" is supported by the record.

STATEMENT OF THE CASE

On February 27, 2010, Appellant Jonathan R. Mallory, was arrested and charged with two Counts each of Burglary in the First Degree and Criminal Domestic Violence of a high and aggravated nature. On January 8, 2011, the Appellant was arrested and charged with Burglary in the Third Degree – 1st Offense. On March 2, 2011, the Appellant appeared before The Honorable Ralph F. Cothran, Jr., and pled guilty to two felony charges of Burglary in the Third Degree. Judge Cothran sentenced the Appellant to a five year sentence suspended upon the service of ninety days and two years of probation and restitution of \$1500 on one of the charges. On the other charge, he imposed a concurrent four year sentence, suspended upon time served and two years of probation. (R.p.13-p.14). As a result of the conviction, the Appellant was required to abide by the standard conditions of probation pursuant to §§24-21-430 and 24-21-80.(R.p.17).

On December 18, 2012, a probation citation was issued against the Appellant for failing to report for four consecutive weeks, failure to complete his public service employment in lieu of payment or as a reduction of his supervision fees, and other financial violations concurrent with §24-21-430. (R.p.11-p.12).

On March 23, 2013, the Appellant was charged with two counts each of operating a vehicle in an unsafe mechanical condition and Driving Under Suspension – License not Suspended for DUI – 1st Offense in Bond Court where he had two bonds of \$652.50 of which one was a cash bond and the other a surety bond (R.p 18-p.26)

On approximately April 4, 2013, the Appellant was arrested and charged with two counts of unlawful neglect of a child, and one count each of two separate felony charges of conspiracy and manufacturing methamphetamine. On April 12, 2013, the Appellant appeared before the

Honorable Clifton Newman for his probation revocation hearing. He was represented by Attorney David Mauldin at the hearing. Judge Newman found a willful violation of probation and revoked his probation in full while giving him credit for his 90 days of previous service. He also converted his restitution to a civil judgment. (R.p.15-p.16).

On July 10, 2013, the Appellant appeared before the Honorable Edward B. Cottingham and his charge of unlawful neglect was nolle prosequi while he pled guilty to the two felony charges. Judge Cottingham sentenced him to four years.

The Appellant now brings this appeal of his probation revocation before this court.

ARGUMENT

The circuit judge did not err by revoking Appellant's probation for failure to adhere to his statutory probation conditions, which included the requirement that he be current on payments regardless of his probation agent's general statements concerning the appellant's efforts to meet his financial obligations since the judge's finding that the appellant's violations were "willful" is supported by the record.

The probation citation alleged the following violations concurrent to §24-21-430:

Subject has violated his probation in the following manner: Subject has failed to report 11/21/12, 11/28/12, 12/5/12, and 12/12/12. Subject failed to pay supervision fees being \$225.00 in arrearages. Subject failed to pay Court Fines being \$70.00 in arrears. Subject failed to follow the advice and instructions of the agent. Subject failed to complete public service employment hours as directed in lieu of a previous supervision fee arrearage having been terminated for failure to report to the worksite. This does constitute a willful violation of standard conditions 1, 7, 9, 10, 11, and special conditions of supervision as agreed to in writing by the offender.

At the probation violation hearing, the agent presented information that Appellant was not putting forth the effort needed to comply with the terms of his probationary sentence despite the department's efforts. The court found that Appellant did not meet the requirements of probation and revoked his probation in full. (R p 15-p.16).

When the sentencing court suspends a sentence to probation, the sentence sheet incorporates by reference the standard conditions of probation. The Department of Probation, Parole and Pardon Services has developed the standard conditions for probation. S.C. Code Ann. § 24-21-430. (R.p.17). Pursuant to S.C. Code Ann. § 24-21-80, the Appellant was required to pay his supervision fees as a condition of his probation. In order to assist the Appellant with his arrearages, the Department applied its discretionary authority to substitute public service employment for supervision fees per this statute. Unfortunately, the Appellant still did not put forth effort to comply as he failed to report to the worksite.

Condition 6 of the Standard Conditions of Probation reads:

I shall not violate any Federal, State, or Local Law, and I shall immediately contact my Agent if I am ever arrested or questioned by a law enforcement official for any reason whatsoever.

Condition 3 of the Standard Conditions of Probation reads.

I shall not use controlled substances, except when properly prescribed by a licensed physician, nor consume alcoholic beverages to excess....

Condition 1 of the Standard Conditions of Probation reads.

I shall report in person to the South Carolina Department of Probation, Parole and Pardon Services' office on the day of my sentencing or release, and as instructed by the Department; and I shall make complete and truthful reports to the Agent.

Condition 10 of the Standard Conditions of Probation reads:

I shall follow the advice and instruction of my Agent and I agree to comply with any further conditions imposed by the Department or its Agents.
(Emphasis added.)

Consequently, Appellant was required to report to his Agent on a regular basis, not violate any laws, not consume alcohol in excess, pay his court-ordered restitution, and complete

his public service employment to assist him with paying his statutory supervision fees and fines as a standard condition of his probation.

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. Additionally, the decision to note the probation violations as "willful" is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion. The facts of this case mirror those found in Hamilton in which the probationer had also failed to pay supervision fees. "Hamilton was [also] charged with failure to report to his probation agent and failure to perform PSE [public service employment]. Therefore, the circuit judge was *not* required to find evidence of willfulness Defense counsel had conceded that Hamilton had failed to report and complete his PSE requirements. A sufficient factual basis supports the circuit judge's decision that Hamilton breached the conditions of his probation." Id. at 649, 650. (Emphasis added.)

"The trial court must determine whether the State has presented sufficient evidence to establish that a probationer has violated the conditions of his probation." State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 655 (2006).

Appellant argues the circuit court erred for his failure to be current on payments where the appellant's probation agent allegedly did not appear to dispute his efforts to meet his probationary financial obligations and since the record did not support that appellant's violations were "willful". As noted in the Hamilton decision, the South Carolina Court of Appeals noted that "It is only when probation is revoked *solely* for failure to pay fines or restitution that a finding of willfulness is mandatory." Id. at 649. (Emphasis added.) Despite the Appellant's

efforts to minimize the facts of his other violations, the record clearly shows that there were several other violations that came into play with the court's decision as noted herein. In actuality, the focus of the probation hearing was noted in the charges as stated in the overall citation. R.p. 3, ll. 10-18, 22-24; R p. 7, ll. 1 In particular, the appellant's probation agent specifically stated: "...we have attempted to help him with his financial obligations which is part of the violation for today, a total of eight times." R p. 3, ll. 10-12. (Emphasis added.)

His agent went on to state: "He also is here today for failure to report for four visits in a row, [and] failing to work public service hours that we had given him in an attempt to help him with his supervision fee arrearage." R.p. 3, ll. 14-17. (Emphasis added.) Despite the Department's efforts to assist the Appellant, he was incarcerated for some significant charges at the time of the hearing. R.p. 3, ll 23-24.

Regardless of the Appellant's alleged assertion of his probation agent's non-adversary position of his efforts to meet his financial obligations, the burden was on the Appellant to provide proof of his "sincere" efforts to meet them and not his agent, who was there simply to present the facts of his case. "A probation agent is a neutral, information-gathering agent of the court, not an agent of the prosecution." U.S. v. Dixon, 187 F.Supp.2d 601 (2002). In State v. Hawkins, 2008 WL 9841738 (S.C. App.), the South Carolina Court of Appeals disagreed with Hawkins' assertion that the court committed reversible error because a probation agent failed to provide sufficient evidentiary basis to establish he violated the conditions of his probation. Rather, the court noted that the circuit judge must determine if there is sufficient evidence to establish that the probationer had violated his probation conditions. *Id.*

As in *Hawkins*, the probationer here specifically admitted to failing to report by and through his counsel and failing to complete his public service hours by not even addressing that

particular violation in his defense. Thus, his silence serves as an adoptive admission of that violation. SC Evid. Rule 801(d)(2)(B). He also essentially admits that he failed to make his payments by stating he “did get behind several times”. R.p. 6, ll. 17. As in Hawkins, the Appellant admitted to not adhering to his probationary conditions and offered no bona fide explanation for his failure to report, complete his public service employment, or pay his restitution and supervisory fees and fines.

Appellant cites several cases in his argument that can be distinguished from the case at bar, as they all involve the revocation of probation for the *sole* failure to pay fines or restitution. Bearden v. Georgia, 461 U.S. 660, 103 S.Ct. 2064 (1983), State v. Spare, 374 S.C. 264 (2007), and Barlet v. State, 288 S.C. 481, 343 S.E.2d 620 (1986) “[I]n those cases *involving the failure to pay fines or restitution*, the circuit judge must, in addition to finding sufficient factual evidence of the violation, make an additional finding of willfulness.” Hamilton, 333 S.C. at 649 (Emphasis added.)

In the Spare decision, the probationer had been served with two *solely* financial probation citations for being in arrears on his restitution. Of particular note in this decision, his probation agent had noted that Spare *had reported* on time and paid what he could toward the restitution. His attorney noted that his Cracker Barrel employment check “. . . was being garnished by the IRS for payment of back taxes and used to pay probation. He noted that Spare resides at a Motel 6 and ate his meals [at work]. He also noted that he paid less toward his financial obligation when he attended the Restitution Center for 181 days because he was making less money than at Cracker Barrel.” *Id.* at 707-708

In the case at hand, the Appellant *failed to report* to his agent for four visits in a row, *failed to work* his public service hours, and *failed to pay* his restitution, supervision fees, and

finer. He never presented any proof of his "problems with his family that was causing financial issues for him" to his agent nor did his counsel present any sufficient proof that showed he had made or was in the process of making bona fide efforts to make his payments R.p. 3, 20-22. Instead, his counsel mentions that he's self-employed, has four children with no mention of any garnishments, and attempts to shift the burden on his agent again for failing to meet with her for a month while admitting the fact he did not report as he was instructed. R.p. 4; ll. 2-24 The only apparent proof that was self-evident to the court was the fact that the Appellant had been incarcerated and charged for manufacturing meth and unlawful conduct toward a child. R.p. 5, ll. 16-18.

While monetary arrearages were included in the violation warrant, the circuit court specifically addressed the matter of Appellant's current incarceration and criminal record (R p. 5, ll. 15-18; R.p. 7, 11-25; R.p. 8, ll. 3-19.). In addition to his failure to pay fines, the judge found sufficient facts that the Appellant violated his statutory probationary conditions as noted in §24-21-430. As stated herein, the court was not obligated to continue the Appellant's probation as he had several statutory probationary violations that were also noted in the record and within the context of the citation. For example, he had *also* not refrained from violating any state or federal penal laws nor avoided any injurious or vicious habits. §24-21-430 (1) and (2). In addition, the court was bound by §24-21-420 to not place Appellant on probation or release him under suspension of sentence as he had been charged with a felony at the time of his revocation hearing. "It is not necessary that a conviction precede a determination that the probationer had violated a condition of probation requiring him to obey all laws" U.S. v Burton, 155 Fed. Appx. 92, 2005 WL 3105681 (C.A.4 (Md.))

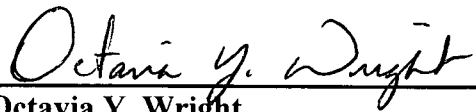
Indeed, as Bearden suggests, it should not be forgotten that Appellant was previously convicted of two felony burglary charges. He failed to comply with the other conditions of probation, and failed to make sufficient bona fide efforts to pay his fine and restitution. As such, he had not demonstrated a willingness to pay his debt to society and an ability to conform his conduct to social norms. His criminal actions had placed him under the supervision of the Department with the requirement that he comply with all statutory probationary conditions. "A defendant's poverty in no way immunizes him from punishment." Id. at 669, 2071

Consequently, the circuit court did not abuse its discretion when it found that the Appellant was not entitled to be continued on probation and ruled that he violated the conditions of probation and revoked his sentence in full.

CONCLUSION

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

Respectfully submitted,



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June 6, 2014

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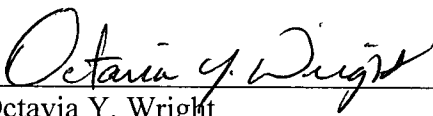
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JONATHAN MALLORY, APPELLANT

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.

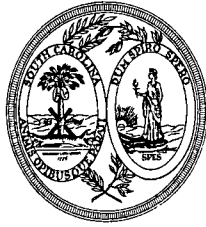


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The Honorable Jenny Kitchings
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RECEIVED
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RE: State v. Jonathan Mallory

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,

Octavia Y. Wright
Octavia Y. Wright
Legal Counsel

OYW:dn

Enclosures

cc: Robert Dudek, Esquire

STATE OF SOUTH CAROLINA
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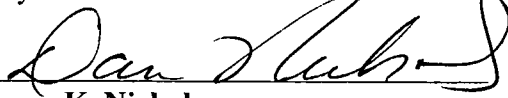
JONATHAN MALLORY, APPELLANT

CERTIFICATE OF SERVICE

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

Robert Dudek, 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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