

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Steven H. John, Circuit Court Judge

RECEIVED

JUN 20 2014

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

STEVE YOUNG,

APPELLANT

APPELLATE CASE NO. 2013-002417

FINAL BRIEF OF APPELLANT

LANELLE CANTEY DURANT
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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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in tolling Young's probation during his period of incarceration for an offense that occurred before his probation when he did not violate his probation according to the probation agent?

STATEMENT OF THE CASE

On November 1, 2013, the Department of Probation, Pardon, and Parole brought Young's current 2011 probation case before the Honorable Steven H. John. Young was represented by Elizabeth C. Fullwood, and the Department was represented by Daniel Shearer. On December 1, 2011, Appellant Steve Young was sentenced in Newberry County to ten years on the charge of assault and battery first degree. The sentence was suspended to time served of 157 days and four years probation which would terminate upon the payment of \$2400 in restitution. R. 1-3, ll. 1 – 25. In August 2012, he was sentenced in Union County to ten years incarceration for the charges of reckless homicide with death resulting, and leaving the scene of an accident. These Union County charges of reckless homicide and leaving the scene of an accident occurred before his conviction for the assault and battery charges in Newberry County in December 2011. However, the conviction for the reckless homicide and leaving the scene of an accident occurred after he was placed on probation in December 2011 in Newberry County. R. 3, ll. 23 – R. 4, ll. 25. The probation agent asked for his 2011 probation to be tolled during his period of incarceration for the 2012 charges for which he must serve 85% of the sentence. The judge ordered that his 2011 probation for 2011-GS-32-00632 be tolled from November 1, 2013 for 759 days through 11-30-2015 or the end of his incarceration. The judge added one year to his probation time to make it five years. R. 3, ll. 1 – R. 12, ll. 7. Young's attorney filed a notice of appeal. This appeal follows.

STATEMENT OF FACTS

On August 21, 2013, the Department of Probation, Parole and Pardon issued a citation for Steve Young for the purpose of bringing a matter before the court for the purpose of tolling his probation or terminating it. The probation agent, Daniel Shearer, told the court that he issued the citation, which did not really violate Young, because "it was kind of hard to bring cases before the court on just a motion," so he issued the citation asking the judge to review the case. R. 5, ll. 5 – 13; R. 3, ll. 1 - 22.

The agent explained that On December 1, 2011, Young was sentenced in Newberry County for ten years on the charge of assault and battery first degree. The ten years was suspended to time served of 157 days which would terminate upon the payment of \$2400 in restitution. He was also ordered to complete 40 hours of community service, attend substance abuse counseling, and be drug tested. R. 3, ll. 8 – 17.

On August 16, 2012, Young was sentenced in Union County to ten years for reckless homicide with death resulting, and leaving the scene of an accident. R. 3, ll. 23 – R. 5, ll. 2. This incident occurred about a year before he was placed on probation in December 2011. However, he was not convicted and sentenced for the reckless homicide until August 16, 2012 after he was placed on probation. R. 4, ll. 1 – 25. The probation agent asked that the court toll Young's probation until he got out of prison. The agent stated:

Right before Mr. Young had been convicted, I had gone ahead and did a paperwork review and kind of made an agreement with him that we would readjust the case and put him in perfect standing with our Department prior to the conviction, so just here to ---we do have to ask that the case be tolled, which would just put the case on hold until he got out of prison. However, if you decide that the case should be terminated or revoked concurrently, we would ask that a civil judgment be ordered for the restitution balance owed to Alfred Cromer, who has been notified and I don't believe is present today, and has not indicated either way how he feels about the case.

R. 4, ll. 8 – 20.

The judge confirmed that Young was on probation for nine months before he was incarcerated. R. 5, ll.1 – 8. The toll date would be from the date of the hearing on November 1, 2013 for 759 days until November 30, 2015 or the end of his incarceration. R. 6, ll. 19. The judge then asked if Young did any of the things he was suppose to on probation before he was incarcerated. The probation agent responded that Young was under supervision for about two years.¹ The department did not allow him to perform the 40 hours community service because his charge was considered violent and violent offenders were not permitted to perform public service. There was a violation for nonpayment but the agent did not violate him since there were no positive drug tests. Young was very cooperative, and he and the agent worked well together. The agent said young just “needed to get a job and get his feet back on the ground.” R. 6, ll. 20 – R. 8, ll. 2.

When the judge said he would grant the agency’s request to toll the probation time, Young’s attorney told the court that this was a situation where the court was not allowed to toll the probation because Young had not done anything to violate the terms and conditions of his probation. Counsel argued that there was no statute that allowed the court to toll the probation. Counsel then cited the Supreme Court case of State v. Miller, 404 S.C. 29, 744 S.E.2d 532 (2013) ² Counsel asked the judge to terminate the probation and convert the restitution to a civil judgment. Counsel argued again that tolling was inappropriate. R. 8, ll. 3 – 19.

¹ This time appears contradictory to the nine months that the agent just confirmed with the judge that Young was on probation before his 2012 conviction.

² The transcript spells it State v. Meller which is presumed to be a typographical error.

The judge then asked the agent if Young were current on all his fees. The agent responded that Young was one payment behind on his supervision fees when he was incarcerated. He had not paid the Public Defender Fund, but had paid \$65 on the restitution. The agent said he would have restructured the restitution on May 1, 2012. Appellant was approximately three payments behind on that when he was arrested. The drug tests fees were not paid. R. 8, ll. 20 – R. 10, ll. 1.

The judge then ruled:

Based on his actions on probation during the time that he was out on probation and not under arrest for the other charge, he was in violation of his terms and conditions of probation. I do find those to be a willful violation. I do find, therefore, it is proper to toll the time period since he was not current, he was not doing what he was supposed to be doing under probation at the time he was arrested for the charges that apparently had occurred prior to him being placed on probation; therefore, we will toll the time period and I'm going to extend his probation for an additional year to the full five years of probation.

R. 10, ll. 2 – 13.

Defense counsel then stated for the record that “the citation that brought Mr. Young before the court did not make any allegations that he had violated the terms and conditions of his probation.” R. 11, ll. 3 – 8.

The judge responded that the case was before the court for a review which “would encompass all of the matters that he was on probation for, including the financial matters.”

R. 11, ll. 9 – 25.

ARGUMENT

The trial court erred in tolling Young's probation during his period of incarceration for an offense that occurred before his probation when he did not violate his probation according to the probation agent.

South Carolina Code Section 24-21-440 concerns the period of probation. It provides:

The period of probation or suspension of sentence shall not exceed a period of five years and shall be determined by the judge of the court and may be continued or extended within the above limit.

There is no mention of a tolling period. However, in the NOTES OF DECISIONS section, Section 2 concerns the "Tolling of Period." The only case cited is State v. Miller, 404 S.C. 29, 744 S.E.2d 532 (2013).

In State v. Miller, Id., the Supreme Court held that a tolling of probation must be premised on a violation of a condition of probation or a statutory directive. The Court wrote: "The references to tolling by our own appellate courts have also focused on fault-based grounds. Thus we conclude that the tolling of probation must be premised on a violation of a condition of probation or a statutory directive." The state had not alleged that Miller violated a condition of his probation. The Supreme Court reversed the Court of Appeals and held that Miller's probation would not be tolled during his civil commitment to the Sexually Violent Predator Program. The Supreme Court did recognize that in instances where the Court had previously recognized tolling was appropriate, "the probationer had generally committed some affirmative act to violate the conditions of probation."

The trial judge in Young's case ruled that Young had violated the financial conditions of his probation although the probation agent was clear that the Department was

not charging Young with any violation. The only violation the judge cited was based on Young not being current on his financial payments.

In Bartlet v. State, 288 S.C. 481, 343 S.E.2d 620 (1986), the Supreme Court ruled that probation may not be revoked solely on the ground that probationer failed to pay fines or make restitution; the judge must determine on the record that the probationer failed to make a bona fide effort to pay. The Court found that Barlet was improperly deprived of his conditional freedom without a finding of willful violation so reversed and remanded the case for a *de novo* probation revocation hearing. The probation judge in Barlet's case had made no determination as to why Barlet had failed to comply with the terms although Barlet testified to his efforts to find work and make payments. The Supreme Court wrote that the deprivation of Barlet's conditional freedom without the finding of a willful violation contravened the Fourteenth Amendment's due process requirement.

The judge in Young's case abused his discretion based on an error of law. He found that Young had willfully violated his probation solely on not being current on the payment of his fees and restitution. This was done without any questioning of Young or his attorney. No evidence was presented regarding the reason Young was behind on his payments. He had made payments as he behind only one payment on his fees and had made a payment toward his restitution.

The finding by the judge of a violation was in contradiction of the holding in Miller where the Supreme Court was clear that tolling should be based on a violation. The probation here admitted there was no violation. The Probation Citation clearly states "no violations charged."

CONCLUSION

Based on the above, Young's probation should be terminated and the restitution converted to a civil judgment.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

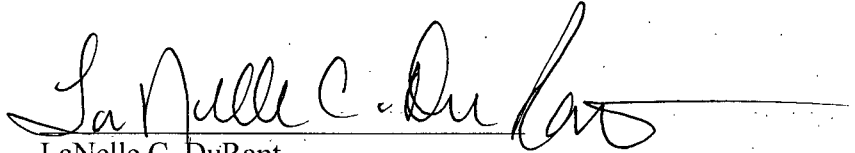
ATTORNEY FOR APPELLANT

This 20th day of June, 2014.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

June 20th, 2014

A handwritten signature in black ink, reading "LaNelle C. DuRant", followed by a horizontal line.

LaNelle C. DuRant
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
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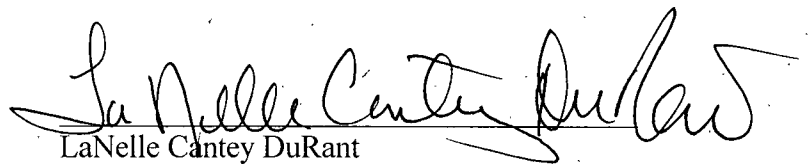
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CERTIFICATE OF SERVICE

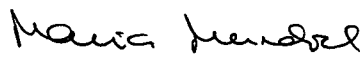
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Matthew C. Buchanan, Esquire, at S. C. Department of Probation, Parole And Pardon Services, PO Box 50666, Columbia, SC 29250, this 20th day of June, 2014.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of June, 2014.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.