

STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of General Session

The Honorable Carmen T. Mullen, Circuit Court Judge

Appellate Case Number 2013-002401

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

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES..... ii

STATEMENT OF ISSUE ON APPEAL..... 1

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

STATEMENT OF FACTS 1

STATEMENT OF THE CASE 1

STANDARD OF REVIEW 2

ARGUMENT..... 2

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

CONCLUSION..... 5

TABLE OF AUTHORITIES

Caselaw

Bearden v Georgia, 461 US 660 (1983).....2, 3, 4
State v Spare, 647 SE2d 706 (SC Ct App 2007)..... 3

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. ROA, p 4-5. After being placed upon probation, the Appellant then paid \$17,075.00 in restitution. ROA, p 13. The Appellant complied with all non-monetary obligations of probation during five years of probation. ROA, p 13-14.

STATEMENT OF THE CASE

On March 28, 2008, the Appellant was indicted for Breach of Trust, greater than \$10,000.00. ROA, p 4-5. She pled guilty to this charge on October 27, 2008.¹ ROA, p 6. 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. ROA, p 11-12. A probation hearing was conducted on October 24, 2013, the Honorable Carmen T. Mullen presiding. ROA, p. 16. The trial court revoked her probation and ordered the service of 2 years of incarceration. ROA, p 15.

The Appellant requested reconsideration of the Court's Order by motion filed on October 31, 2013. ROA, p 28-31. The trial court declined to conduct a hearing regarding

¹The transcript for this plea and sentencing hearing is no longer available.

this reconsideration request. ROA, p 32. The trial court also declined to reconsider the Probation Violation Order. ROA, 32.

On November 5, 2013, the Appellant filed a Notice of Appeal. ROA, p 33. Thereafter, undersigned counsel was retained and the Appellant was released upon the posting of an Appeal Bond. 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. ROA, p 21, 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 \$17,075.00 of restitution during her five years of probation. ROA, 13.

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..." ROA, p 21, l. 24- p. 22, l. 3 & p 23, l. 3-4. Further, the trial court expressed that no options, besides revocation, existed.

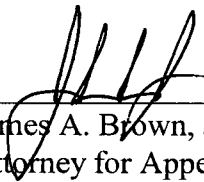
Instead, the trial court expressed disdain for sentencing judges who "... have these people that owe these great amounts of money, that we know people have to be able to pay back, and we should just put them in prison on the front end." ROA, p 23, l. 5-8. Ironically, the trial court judge who revoked the Appellant's probation is the very same judge who found probation appropriate at the sentencing five years earlier. ROA, p 6. 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." ROA, p 23, 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." ROA, p 23, 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.



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June 26, 2014
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8

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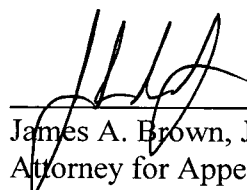
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v.
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CERTIFICATE OF COUNSEL

The undersigned counsel certifies that the Final Brief complies with SCACR 211(b).

June 26, 2014


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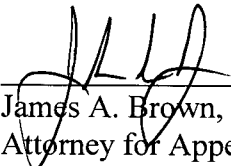
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PROOF OF SERVICE

Counsel for Tonja McAllister hereby certifies that he has prepared and served a copy of the Final Brief on this 26th day of June, 2014, upon the State, by depositing a copy, postage pre-paid, in the United States Mail, addressed to Matthew C. Buchanan, South Carolina Department of Probation, Parole and Pardon Services, P.O. Box 11589, Columbia, SC 29211.

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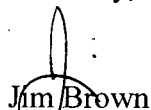
RE: State v. McAllister; Indictment Number 2008GS0700248

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Ms. Kitchings:

Please find enclosed for filing an unbound original and 14 bound copies of the Final Brief. Also enclosed is the Certificate of Counsel and Proof of Service for the same. Should you require anything further, please do not hesitate to contact our office.

Sincerely,


Jim Brown

Enclosures

cc: Matthew C. Buchanan, South Carolina Department of Probation, Parole and Pardon

Services, w/enclosures

Tonja McAllister, w/enclosures