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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

O'NEAL BERNARD BYRDIC, JR.,

APPELLANT

APPELLATE CASE NO. 2014-001675

INITIAL REPLY BRIEF OF APPELLANT

JOHN H. STROM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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ARGUMENTS IN REPLY

I

Appellant's due process rights were violated when the court failed to provide Appellant with the opportunity to testify in his own defense, to present evidence, or to call witnesses in order to refute the State's allegations of non-compliance with his required course of treatment.

In its brief, the State argues that Petitioner never exhibited any desire to testify in his own defense, to call witnesses, or present evidence. Resp't Br. 6-8. However, a review of the truncated record reveals that Appellant was denied the opportunity to respond in any manner to the State's allegations. Tr. 5, ll. 10 – Tr. 7, ll. 11. This was a violation of Appellant's due process rights under *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

The State further argues that Appellant only "requested a full hearing regarding his inability to pay, citing that as the reason behind his violations." Resp't Br. 8. This is not an accurate representation of Appellant's objections. The transcript excerpt cited by the State in footnote two of the State's brief is taken out of context. *Id.*; see *O'Leary-Payne v. R.R. Hilton Head, II, Inc.*, 638 S.E.2d 96 (Ct. App. 2006) (appellate court reviews arguments in the context of the entire record).

A fuller recitation of the transcript reveals that Appellant was also objecting to the State's allegations of non-compliance with treatment:

MR. OPPERMANN: We have stated that Mr. Bearden [*sic*], a great deal of the responsibility for these alleged violations has to do with ability to pay. And Bearden versus Georgia says that that can't be the basis for a willful violation.

THE COURT: No, sir. You mis --

MR. OPPERMANN: And so we would ask for a full hearing and then continue --

THE COURT: Wait a minute, Counsel. You misconstrued what I said. I'm not violating him on the basis he didn't pay. I'm violating him on the clear basis that he's not participating in this serious program and refuses to do so. That's the sole basis for my violation. I'm going to violate one year. Put him in jail.

MR. OPPERMANN: And, Your Honor, we haven't had the opportunity to address whether or not --

THE COURT: I don't need it. I've heard enough to know that he's a danger to children, doesn't believe he's got a problem. He needs to be in jail. Now, I ought to revoke him in full. I'm not going to do that. I am going to revoke one year for his attitude. It's not because of failure to pay.

MR. OPPERMANN: And I appreciate that, Your Honor. For the record, we believe that Mr. Byrdic has been denied due process since the allegation of noncompliance.

THE COURT: I understand your proceeding [*verbatim*], but I think he has.

Tr. 5, ll. 10 – Tr. 7, ll. 11. The court stated that its reason for revoking probation was solely because of non-compliance with the sex offender treatment and Appellant vociferously objected to the court's rushed determination. *Id.*

The court and the probation officer repeatedly cut short Appellant's attempts to present any defense. *See State v. Pace*, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994) (applying the doctrine of futility when "the tone and tenor of the trial judge's remarks concerning her gender and conduct were such that any objection would have been futile.") It is clear from the court's ruling and demeanor that any further efforts by Appellant to present his case would have been futile. *See State v. Higgenbottom*, 344 S.C. 11, 542 S.E.2d 718 (2001) (employing futility doctrine).

Accordingly, the trial court erred by revoking Appellant's probation without allowing Appellant the opportunity to testify, call witnesses, or present any evidence disproving the State's allegations. *Gagnon*, 411 U.S. at 786; *see also State v. Riddle*, 277 S.C. 110, 282 S.E.2d 863 (1981).

II

The State misapprehends Appellant's due process argument, probation revocation hearings are not full criminal proceedings and are sufficiently flexible so as to allow the court to consider letters and affidavits; however, the trial court violated Appellant's due process rights by denying Appellant the opportunity to cross-examine Dr. Burke because his assessment letter provided the sole basis for revoking Appellant's probation.

The State correctly argues that probation revocation hearings are not criminal proceedings and that evidence that would not be admissible in a criminal trial is admissible at a revocation hearing. Resp't Br. 9-10. However, the State errs in contending that Appellant had no Sixth Amendment rights in probation revocation proceedings and that Dr. Burke's letter, standing alone, provided the trial court with enough evidence to revoke Appellant's probation. *Id.*

"The Due Process Clause of the Fourteenth Amendment imposes procedural and substantive limits on the revocation of the conditional liberty created by probation." *Black v. Romano*, 471 U.S. 606, 610 (1985). The procedural limits include affording a probationer a number of rights:

The probationer is [1] entitled to written notice of the claimed violations of his probation; [2] **disclosure of the evidence against him**; [3] ***an opportunity to be heard in person and to present witnesses and documentary evidence***; [4] a neutral hearing body; and [5] a written statement by the factfinder as to the evidence relied on and the reasons for revoking probation. . . . [6] ***The probationer is also entitled to cross-examine adverse witnesses, unless the hearing body specifically finds good cause for not allowing confrontation.***

Id. at 611-12 (citing *Gagnon*, 411 U.S. at 786) (*emphasis added*). Therefore, the right to cross-examine adverse witnesses is explicitly granted to probationers. *Gagnon*, 411 U.S. at 786 (citing *Morrissey v. Brewer*, 408 U.S. 471, 488-489 (1972)).

The Supreme Court has provided only one exception restraining the right to confront an adverse witness in a probation revocation hearing:

On request of the parolee, person **who has given adverse information on which parole revocation is to be based is to be made available for questioning in his**

presence. However, if the hearing officer determines that an informant would be subjected to risk of if his identity were disclosed; he need not be subjected to confrontation and cross-examination.

Morrissey, 408 U.S. at 487 (*emphasis added*). This narrow exception requires a “hearing officer to “specifically [find] good cause for not allowing confrontation”. *Id.* at 489

Appellant unambiguously stated that he wished to have a full hearing to contest the allegations of non-compliance. Tr. 6, ll. 9 –Tr. 7, ll. 19. As Burke’s letter was the sole basis for the court revoking Appellant’s probation, Dr. Burke should have been present at the revocation hearing for questioning or the State should have been required to show how Burke’s presence at the hearing would have made him subject to a risk of harm. *Morrissey*, 408 U.S. at 487; *U.S. v. Doswell*, 670 F.3d 526 (4th Cir. 2012). Appellant strongly contested the allegations in Dr. Burke’s letter and the trial court summarily found that Appellant was a danger based exclusively on the contents of the letter. Tr. 7, ll. 1-15.

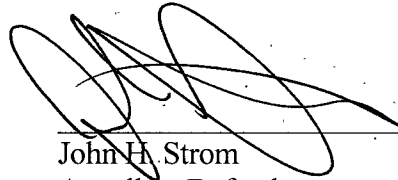
While probation revocation hearings are informal, flexible proceedings, probationers do enjoy limited due process rights to insure that they are not unconstitutionally deprived of their liberty. *Morrissey*, 408 U.S. at 482. The United States Supreme Court has unambiguously held that, among those rights, probationers have the right to confront adverse witnesses subject only to a showing of good cause for the declarant’s absence in situations where the declarant would be “subject to risk” if his/her identity were disclosed. *Gagnon*, 411 U.S. at 786 (*citing Morrissey*, 408 U.S. at 487)

Therefore, the trial court violated Appellant’s due process rights by denying Appellant the opportunity to cross-examine Dr. Burke because his assessment letter provided the sole basis for revoking Appellant’s probation. *Id.*

CONCLUSION

For these additional reasons, Appellant respectfully requests this Court reverse the ruling of the trial court, release Appellant from custody, and remand for a new probation hearing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John H. Strom", is written over a horizontal line.

John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT.

This 14th day of May, 2015.

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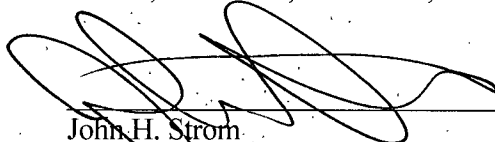
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CERTIFICATE OF SERVICE


The undersigned attorney hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon Matthew Buchanan, Esquire, at South Carolina Department of Probation, Parole & Pardon Services, PO Box 50666, Columbia, SC 29250, this 14th day of May, 2015.



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 14th day of May, 2015.



(L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.