

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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JUN 24 2015

SC Court of Appeals

Appeal from Horry County
The Honorable Edward B. Cottingham, Circuit Court Judge
Case No. 2014-001675

THE STATE, RESPONDENT

v.

O'NEAL BERNARD BYRDIC, JR., APPELLANT

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The Appellant's due process rights were not violated by the trial court because probation revocations are not meant to rise to the level of a criminal prosecution.

The Appellant's right to due process was not violated by the trial court for failure to allow cross examination of a witness because probation hearings are flexible enough to consider letters and affidavits.

STATEMENT OF THE CASE

The State concurs with the Appellant's Statement of the Case.

ARGUMENT

The Appellant's due process rights were not violated by the trial court because probation revocations are not meant to rise to the level of a criminal prosecution.

The Appellant is on probation for disseminating obscene material to a person under 18 years old, and for criminal solicitation of a minor. On July 3, 2014, a citation for several violations, including being terminated from sex offender counseling for noncompliance, was served on him. (R.p.11, 14). Appellant appeared before the Honorable Judge Edward B. Cottingham on July 18, 2014.

At the violation hearing, the probation agent presented the court with the violation report along with a letter from Dr. William Burke describing the Appellant's noncompliance with court-ordered sex offender treatment. (R.p.15). Upon consideration of the evidence presented, the court found the Appellant to be in violation of his probation and revoked one year of his suspended sentence.

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.

A person on probation is entitled to limited due process rights. *See Gagnon v. Scarpelli*, 411 U.S. 778, (1973), citing *Morrissey v. Brewer* 408 U.S. 471, (1972). While due process rights require a hearing when there are violations alleged, that hearing does not rise to the level of a trial. *Brewer*. at 489. ("We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense.")

This is part of South Carolina jurisprudence as well. South Carolina courts have stated repeatedly that revocations hearings are more informal affairs.

While the underlying violations may themselves be criminal offenses, the probation revocation proceeding is not a criminal trial of those charges. See *Shaw v. Henderson*, 430 F.2d 1116, 1118 (5th Cir. 1970), but a more informal proceeding with respect to notice and proof of the alleged violations. See *State v. White*, 218 S.C. 130, 61 S.E.2d 754 (1950). (...) We think that while a person convicted of a crime is still restrained within the confines of his probation, he does not enjoy the same unfettered constitutional privileges available to those not so confined. It is elementary that while conviction and imprisonment do not strip the violator of his rights, those privileges are severely diminished.

State v. Franks, 276 S.C. 636, 281 S.E.2d 227 (1981).

Furthermore, because a person on probation has been convicted, the protections extended to criminal defendants are diminished. The South Carolina Supreme Court in *State v. Hill*, 368 S.C. 649, 630 S.E.2d 274 (2006), held that “the intervening criminal sentence is the crucial point at which the due process guarantees dramatically change.” *Id.* at 657, 279. In *Hill*, the Court determined that *Brady*¹ and criminal discovery rules did not apply to probation revocation hearings.

In the instant case, the evidence presented to the court satisfied the judge that the Appellant had willfully violated probation. (R.p. 11.2 – 10). The Appellant then requested a full hearing. However, the Appellant was at that moment receiving a full hearing on the violation. He was present before the court where the evidence was being disclosed, and the Appellant was represented by counsel.

¹ *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963).

Appellant through this appeal now claims that his due process rights were violated by the court in declining his request for another hearing, claiming that he was denied the opportunity to testify in his own defense, call witnesses, or present evidence in violation of *Gagnon*. However, at no point during the hearing did the Appellant state that he wished to testify in his own defense, call witnesses, or present evidence. This, despite being informed by his citation, that he has these rights.

You have the right at the hearing to question any person who appears as a witness against you and to have witnesses appear on your behalf. You may present evidence on your behalf. You may have an attorney represent you. If you cannot afford an attorney, an attorney will be appointed for you. You must advise the agent or the court in writing of your desire for an attorney. It is your responsibility to make arrangements for your witnesses and your attorney to appear at the hearing.”

(R.p.14).

The citation gave the Appellant notice of his rights and ample notice of the nature of the alleged violations, against which he could have worked to obtain witnesses or evidence. The transcript of the hearing contains no evidence that the Appellant had witnesses to testify or evidence he wished to produce, or if he wished to testify. Instead, Appellant requested a full hearing regarding his inability to pay, citing that as the reason behind his violations. However, the court clearly stated that its reasons for revoking probation was solely because of noncompliance with the sex offender treatment.²

² The transcript describes the exchange between the court:

Mr. Oppermann: ...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's denial of the Appellant's request for another hearing was therefore not a violation of due process, because the reason for the hearing was over an issue that was not at issue before the court. The trial court was well within its discretion to deny the motion for another hearing, which could have been a delaying tactic because of the court's stated intent to revoke a portion of probation.

The Appellant's right to due process was not violated by the trial court for failure to allow cross examination of a witness because probation hearings are flexible enough to consider letters and affidavits.

Appellant claims that his due process rights were violated by the refusal of the trial court to allow the cross-examination of Dr. Burke. The letter provided to the court from Dr. Burke contained enough evidence to satisfy the court that a violation had taken place.(R.p.15).

“Instead of requiring proof beyond a reasonable doubt, probation is properly revoked upon an evidentiary showing of facts *tending to establish* a violation. *State v. Hill*, 368 S.C. at 658, citing *State v. White*, 218 S.C. 130, 136, 61 S.E.2d 754, 756 (1950) (emphasis in the original).

The right to confrontation drawn from *Gagnon v. Scarpelli*, 411 U.S. at 786, citing *Morrissey v. Brewer*, 408 U.S. at 489 do not and should not rise to the full confrontation found in the Sixth Amendment of the U.S. Constitution. The Court in *Morrissey*, after describing the minimal due process requirements of a violation hearing,

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.

Tr. 6, ll. 19 – Tr. 7, ll.6.

states, “the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.”

This Court in *State v. Pauling*, 371 S.C. 435, 639 S.E.2d 680 (Ct.App. 2006), recognized this, when it declined to extend the confrontation rights in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), to revocation hearings.

Simply put, Sixth Amendment rights are not implicated in probation revocation proceedings. *U.S. v. Kelley*, 446 F.3d 688, 691-92 (7th Cir. 2006).

In the present case, the court considered the information presented in Dr. Burke’s letter, which describes the reasons for Appellant’s termination from counseling. (R.p. 6, ll. 7). Far from simply stating that the Appellant was no longer in treatment, the letter describes several instances of his noncompliance. (R.p.15).

The Appellant made the court aware that he did not agree with the contents of the letter. (R.p. 5, ll. 15-16; R.p. 8, ll. 1-2). If the court had believed a cross-examination of Dr. Burke would be able to persuade the contents of the letter were incorrect, the court could have postponed the hearing and required Dr. Burke’s presence for questioning. However, the court did not – most likely because the court recognized the lower standard of proof required in revocation proceedings. *State v. White*, 218 S.C. at 135. (“It follows that the authority of the court of general sessions to revoke such suspension of sentence may not be capriciously or arbitrarily exercised, but should always be predicted upon an evidentiary showing of fact tending to establish violation of the conditions.”)

The Appellant urges this Court to look past the clear holdings in *Pauling* and the relaxed requirements of due process outlined in *Morrissey*. This would have a dilatory effect on probation violation hearings, forcing the court to halt proceedings as soon as a

probationer requests to cross-examine someone other than the presenting agent. In the alternative, the Department would be required to subpoena witnesses into court to be available for cross-examination, which could include police officers who created incident reports showing the probationer's involvement in other crimes as was the case in *Pauling*, or other probation agents who worked on the case but are now in different roles or perhaps no longer with the Department.

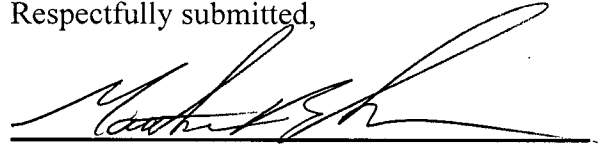
Similarly, in the instant case, a cross-examination of Dr. Burke would likely not have been fruitful for the Appellant. While he may disagree with Dr. Burke's assessment of his performance and efforts while in sex offender treatment, even a vigorous and skillful cross-examination would not have persuaded the trial court in its assessment that the Appellant was not participating. The Appellant appeared to have focused on his attendance, which admittedly was regular. However, Dr. Burke was not concerned with his attendance, but his lack of participation and denial of his problems.

Consequently, expanding the right of cross-examination to equate with criminal defendants would be against the holdings in *Pauling* and *Morrissey*. Therefore, the court did not err when it considered the letter of Dr. Burke to rule that Appellant had violated his probation.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that the trial court's ruling be upheld.

Respectfully submitted,



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June 23, 2015

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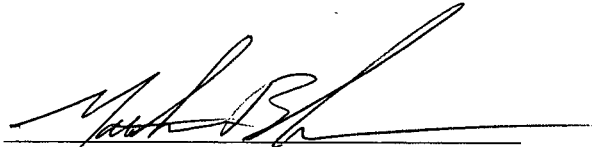
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CERTIFICATE OF COUNSEL

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.



Matthew C. Buchanan
General Counsel

June 23, 2015

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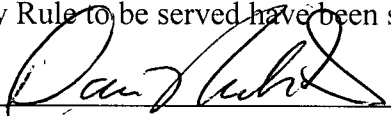
O'NEAL BERNARD BYRDIC, JR., APPELLANT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent* dated June 23, 2015, on Appellant this 23rd day of June, 2015, by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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I further certify that all parties required by Rule to be served have been served.



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