

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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JUL 23 2015

THE STATE,

RESPONDENT

SC Court of Appeals

v.

STEVE YOUNG,

APPELLANT

APPELLATE CASE NO. 2013-002417

Appeal from Lexington County

Steven H. John, Circuit Court Judge

Opinion No. 2015-UP-345

PETITION FOR REHEARING

The Court of Appeals affirmed the above named appellant's conviction and sentence on July 15, 2015. In support of this petition for rehearing, which is being submitted on today's date pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, Appellant submits the following:

On appeal, Young argued that the trial court erred in tolling his 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. Young asked that his probation be terminated and the restitution converted to a civil judgment.

The Court of Appeals affirmed, in an unpublished opinion, the trial court's tolling of Young's probation during his period of incarceration for an offense subsequent to the one for which he was on probation. The Court held that the trial court properly found that Young had violated the conditions of his probation by failing to remain current on his financial obligations. The Court distinguished the case of State v. Miller, 404 S.C. 29, 744 S.E.2d 532 (2013), which Young relied on, by holding that Miller was involuntarily committed to the sexually violent predator program while Young voluntarily committed a criminal offense. Second, the Court held that Young's due process rights were not implicated because this was a motion hearing and not a revocation hearing. The Court then opined that Young did not object to the circuit court's finding that he violated his probation by willfully failing to make required payments. Therefore, this point was not preserved for review.

The Court misapprehended the issues.

On August 21, 2013, the Department of Probation, Parole and Pardon issued a citation for Steve Young 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 had been 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 supposed 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.

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.

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.

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.

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

Defense counsel then stated 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.

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 Court erred in holding that the circuit court properly found Young violated his probation based on his failure to meet his financial obligations. This Court overlooked the fact that Young had made some payments. However, the trial judge did not hold a hearing nor ask any questions about the willfulness of Young not making payments. Young had no positive drug tests; he reported regularly and did well with his probation agent. This Court found that Young's attorney did not object when the trial judge found that Young had violated his probation by failing to pay. This was in error as on R. 11, ll. 4-8, defense counsel objected by stating to the judge that the citation made no allegations that Young had violated his probation. This was after the judge's ruling. The trial judge's ruling of a violation without any questioning was an error.

The Court distinguished Miller from Young's case by holding that Miller was involuntarily committed while Young voluntarily committed a criminal offense. This Court overlooked the fact

that Miller was sent to the Sexually Violent Program based on the fact that he had been incarcerated for a criminal sexual offense which he voluntarily committed. But for that offense, Miller would not have been in the SVP Program

The Court wrote that Young should not be allowed to benefit from his wrongful acts. Young was going to prison for ten years. This was not benefiting from his wrongful act which occurred before he was placed on probation. He would be supervised by law enforcement authorities while in prison-not probation agents but still prison guards. This was not as though he had absconded from probation supervision and was not under the supervision of anyone.

Young's liberty and property interests were involved when the trial court tolled his probation because upon his release from prison, he would be facing five years of probation with all of the financial obligations that involved in addition to the \$2400 restitution. This would be more difficult because he would then have a criminal record of being incarcerated ten years. There was a stronger potential of having his revocation revoked. Young's due process interests were at stake.

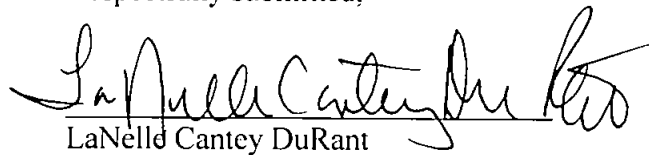
The judge in Young's case abused his discretion based on an error of law. No evidence was presented regarding the reason Young was behind on his payments. He had made payments as he behind only one payment on his fees and had made a payment toward his restitution.

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 agent here admitted there was no violation. The Probation Citation clearly states "no violations charged."

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

WHEREFORE, we respectfully request this Court to reconsider its ruling, and remand Young's case for a reversal of the order tolling probation, and for termination of his probation.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "LaNelle Cantey DuRant". The signature is written in a cursive style with a long horizontal line extending to the right.

LaNelle Cantey DuRant
Appellate Defender

This 23rd day of July, 2015.

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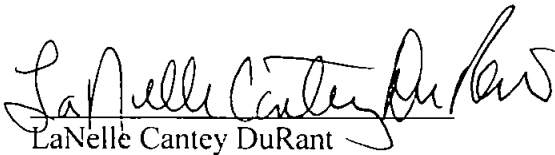
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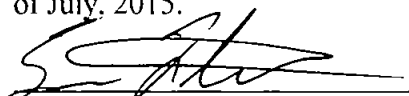
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon, Matthew Buchanan, Esquire, at South Carolina Department of Probation, Parole & Pardon Services, P.O. Box 50666, Columbia, SC 29250, and Mr. Steve Young # 265045, at Trenton Correctional Institution, 84 Greenhouse Road, Trenton, SC 29847, this 23rd day of July, 2015.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 23rd day
of July, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.