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JUL 29 2015

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

R. Keith Kelly, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TABITHA SHEA JONES,

APPELLANT

APPELLATE CASE NO. 2015-001109

ANDERS BRIEF OF APPELLANT

ROBERT M. PACHAK
Appellate Defender

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Division of Appellate Defense
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(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether appellant's probation should have been revoked when her violation was not willful?

STATEMENT OF THE CASE

Appellant pled guilty on April 11, 2013, in Lexington County to unlawful conduct towards a child. She was sentenced under the Youthful Offender Act not to exceed 6 years suspended to probation for 2 years. She was served with a probation violation arrest warrant on February 9, 2015. On May 8, 2015, she appeared before the Honorable R. Keith Kelly for a probation violation hearing. She was represented by Thomas E. Sheely, Esquire. Judge Kelly revoked her probation so that she would have to do the YOA sentence.

This appeal follows.

ARGUMENT

Appellant's probation should not have been revoked because her violation was not willful.

In 1972 the United States Supreme Court handed down the opinion of Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593 setting forth minimal due process requirements for the revocation of parole. The Court noted that "revocation deprives an individual... of the conditional liberty properly dependent on observance of special parole restrictions." 408 U.S. at 480, 92 S. Ct. at 2600. The Court went on to write that there must be an orderly process before a liberty protection is terminated. 408 U.S. at 482, 92 S. Ct. at 2601. First, the Court dealt with the parolee's arrest and the need for a preliminary hearing. The Court stated:

Due process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available. Cf. Hyser v. Reed, 115 U.S. App. D.C. 254, 318 F.2d 225 (1963). Such an inquiry should be seen as in the nature of a 'preliminary hearing' to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions. Cf. Goldberg v. Kelly, 397 U.S., at 267-271, 90 S. Ct. at 1020-1022, 25 L.Ed2d 287.

408 U.S. at 484, 92 S. Ct. at 2602

With respect to the preliminary hearing before this officer, the parolee should be given notice that the hearing will take place and that its purpose is to determine whether there is probable cause to believe he has committed a parole violation. The notice should state what parole violations have been alleged. At the hearing the parolee may appear and speak in his own behalf; he may bring letters, documents, or individuals who can give relevant information to the hearing officer.

408 U.S. at 486-487, 92 S. Ct. at 2603.

With respect to the revocation hearing the Court wrote:

We cannot write a code of procedure; that is the responsibility of each State. Most States have done so by legislation, others by judicial decision usually on due process grounds. Our task is limited to deciding the minimum requirements of due process. They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry; 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.

408 U.S. at 488 - 489, 92 S.C. at 2604.

In Gagnon v. Scarpelli, 411, U.S. 778, 93 S. Ct. 1756 (1973) the Court made the same procedures set out in Morrissey applicable to probation revocations. A short time later the Court held that due process is violated when the state revokes probation with no evidence that probation was violated. Douglas v. Burden, 412 U.S. 430, 93 S. Ct. 2199 (1973). Then in Bearden v. Georgia, 466 U.S. 660, 103 S. Ct. 2064 (1983) the Court held that the State can not revoke a defendant's probation because he is too poor to pay a fine. A probation violation has to be willful. The South Carolina Supreme Court a short time later also held the probation could not be revoked "solely" on the ground that one on probation failed to pay fines or to make restitution (emphasis in original). Barlet v. State, 288 S.C.

481, 343 S.E.2d 620 (1986). The judge has to make a finding “on the record that the probationer failed to make a bona fide effort to pay.” Id.

Appellant in this case was ordered to attend substance abuse counseling as part of her probation. Later she tested positive for cocaine. (Tr. p. 3, l. 12- 20) It was clear her violation was not willful because of her cocaine problem. In Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417 (1962), the Supreme Court of the United States held that it inflicted cruel and unusual punishment in violation of the Fourteenth Amendment for a state law to make a “status” of narcotic addiction a criminal offense. Appellant’s probation should not have been revoked because of her “status” violation.

CONCLUSION

The decision to revoke appellant's probation should be reversed.

Respectfully submitted,

Robert M. Pachak

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of July, 2015.

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TABITHA SHEA JONES,

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APPELLATE CASE NO. 2015-001109


PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tabitha Shea Jones states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge R. Keith Kelly, which was held on May 8, 2015, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Tabitha Shea Jones.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of July, 2015.

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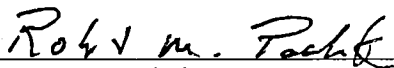
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) Indictment;
- (2) Probation violation arrest warrant
- (3) Trial Transcript
- (4) May 8, 2015 order revoking probation

I certify that this designation contains no matter which is irrelevant to this appeal.

July 29th, 2015



Robert M. Pachak
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

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant 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."

July 29, 2015

Robert M. Pachak

Robert M. Pachak
Appellate Defender

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal in the above referenced case has been served upon Matthew Buchanan, Esquire, at the South Carolina Department of Probation, Parole & Pardon Services, PO Box 50666, Columbia, SC 29250; and on Tabitha Shea Jones, #363993 at Graham Correctional Institution, 4450 Broad River Road, Columbia, SC 29210, this 29th day of July, 2015.

Robert M. Pachak

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 29th day of July, 2015.

Mary Munday (L.S.)

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