STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Cherokee County
The Honorable R. Keith Kelly, Circuit Court Judge
Case No. 2014-002066

THE STATE, ... RESPONDENT

v.

TERRY HALL . . . . . .APPELLANT

FINAL BRIEF OF RESPONDENT

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ATTORNEY FOR THE RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

1. **Whether the Court properly exercised its discretion in revoking appellant's probation after considering evidence presented at the hearing?**

2. **Whether the Court had jurisdiction over the appellant where the appellant's probation did not begin until his release from incarceration, as ordered by the sentencing judge?**

STATEMENT OF THE CASE

On December 9, 2008, the appellant pled guilty to attempted 2nd degree burglary before the Honorable R. Markley Dennis, Jr., in Cherokee County. At the same hearing, he also faced a probation violation. For the plea, he received a sentence of twelve years suspended to five years probation. Special conditions of that sentence were no contact with the victim and probation was to be tolled until the satisfaction of his probation revocation. (R.p.27-28; R.p.30). He was revoked six years for his probation violation. (R.p.33).

The appellant's probation began upon his release from the Department of Corrections on September 1, 2011. On December 9, 2013, the appellant appeared before the Honorable R. Keith Kelly on a probation violation wherein he was continued on probation.

The appellant again appeared before Judge Kelly on September 15, 2014 for a violation hearing. There was some concern about the affidavits alleging that the appellant possessed a firearm while on probation, the Court continued the case. (R. p. 9, l. 4-5). Then on September 17, 2014, the violation hearing was picked up with witnesses present in court, where they were cross-examined by the appellant's attorney. (R. p. 16, l. 17 – 22, l.10).

Judge Kelly revoked the appellant's probation, finding that he had been convicted of two magistrate offenses while on probation, and he possessed a firearm on two different occasions. The appellant now appeals the circuit court's decision.

ARGUMENTS

1. The Court did not err in revoking appellant's probation because the Court did not abuse its discretion when it found evidence that appellant violated his probation.

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 (Ct.App.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.*

"The trial court must determine whether the State has presented sufficient evidence to establish that a probationer has violated the conditions of his probation." *State v. Allen*, 370 S.C. 88, 94, 634 S.E.2d 653, 655 (2006).

Contrary to the appellant's assertion that no evidence had been offered at the probation hearing that he had been convicted of two other offenses, the transcript clearly shows that the probation agent stated he had been convicted of an assault and battery 3rd degree and a driving under suspension. (R. p.3, l. 1-6). Furthermore, the appellant conceded he had been convicted of those offenses, although he did attempt to call their validity into question. (R. p. 4, l. 18 – 5, l. 2; p. 8, l. 12-22).

The Court also granted a continuance to allow the witnesses to the gun possession be present in court to testify. This afforded the opportunity for the witnesses to be cross-examined by the appellant's attorney. Both witnesses testified that they observed the appellant in possession of a firearm. (R. p. 15, l. 12-18; (R. p. 20, l. 18-22).

At the conclusion of the hearing, the trial court found that the State presented sufficient evidence that the appellant violated the conditions of his probation. (R. p. 25, l. 15-18).

Even if the Court erred in the finding of one of the grounds for the violations, if any of the other violations are valid, the Court did not abuse its discretion. "When the trial court's revocation decision is upheld on one ground, it ordinarily is immaterial whether probation was properly revoked on other grounds unless the entire proceeding was tainted by a given error. *See State v. Williamson*, 356 S.C. 507, 512, 589 S.E.2d 787, 789 (Ct.App.2003) (declining to address probationer's arguments regarding other grounds for revocation after concluding trial court properly revoked probation on one ground) *State v. Allen*, 370 S.C. at 103.

Appellant also argues that the Court erred by not issuing a written statement regarding the reasons for revoking probation in violation of *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973). However, the trial court did in fact issue a written statement by listing the reasons for the revocation in the Form 9 order, when it listed, "violation of sections # 4, 6, 7, 9 & 10." (R.p.29). Those numbers refer to the standard conditions of probation that are incorporated by reference on every sentence sheet and signed by the appellant. (R.p.32).

Furthermore, *Gagnon's* holding is not meant to be a strict requirement that would force all courts when revoking probation to describe in detail the violations and their reasons for revocation. Gagnon is based on the holding in *Morrissey v. Brewer*, 408 U.S. 471 (1972), which states, "We have no thought to create an inflexible structure for parole revocation procedures." *Id.* at 490. By extension, probation revocation procedures should be similarly flexible. *See Gagnon* at 782, n. 3 ("[R]evocation of probation where sentence has been imposed previously is constitutionally indistinguishable from the revocation of parole.")

Therefore, because the revocation order listed the Court's findings and reasons for the violation, the due process requirement of Gagnon was satisfied. The revocation should be upheld.

2. The Court had jurisdiction over the appellant because the warrant was issued and served before the appellant's probation expired.

The appellant insists that his probation would have started at the date of his sentence, being December 9, 2008, and his probation would have expired five years later. Thus, the probation's warrant issued on August 14, 2014, would have been after his probation expired. This assertion is incorrect.

Judge Dennis' sentence on December 9, 2008 contained the special condition that "Probation is told (sic) until he satisfies his present sentence on Burg 2nd." R. * The appellant was also sentenced to serve six years incarceration on his probation violation for Indictment 05-GS-11-052. (R.p.33).

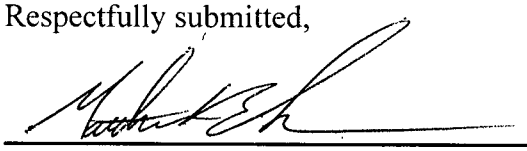
Consequently, the appellant's probation did not begin until his release from incarceration on September 1, 2011. His probation was to have continued to September 1, 2016. It is generally accepted that sentencing courts have the power to set the start dates of probation, and is most often exercised when the defendant is serving another sentence. *See State v. Lee,* 350 S.C. 125 (Ct. App. 2002) and *State v. Proctor*, 345 S.C. 299 (Ct. App. 2001).

Therefore, the date of issuance of the warrant, August 14, 2014, was firmly within the appellant's probation period. (R.p.31). The warrant served to confer subject matter jurisdiction to the General Sessions Court, which held the violation hearing while the probationary period was still running. The Court's revocation should be upheld as proper.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that the Appellant's appeal be dismissed.

Respectfully submitted,



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August 31, 2015

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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

August 31, 2015

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CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent* dated August 31, 2015, on Appellant this 31st day of August, 2015, by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Robert Dudek, Chief Appellate Defender
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I further certify that all parties required by Rule to be served have been served.

Dawn K. Nichols
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