

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SEP 14 2015

SC Court of Appeals

Appeal from Cherokee County

R. Keith Kelly, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TERRY HALL,

APPELLANT

APPELLATE CASE NO. 2014-002066

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES.....	2
STATEMENT OF ISSUES ON APPEAL.....	3
STATEMENT OF THE CASE	4
ARGUMENT 1	
The Court erred by revoking appellant’s probation in full for appellant allegedly being convicted of two offenses and having been arrested for another offense since there was no evidence presented at the revocation hearing to support those allegations, and the revocation was therefore improper.....	6
Relevant facts.....	6
ARGUMENT 2	
The court erred by revoking appellant’s probation where his five years of probation had expired by the time the arrest warrant was issued on August 8, 2014, since appellant was sentenced on December 9, 2008, since the court lacked jurisdiction over appellant at the time the warrant was issued.....	8
Relevant facts.....	8
CONCLUSION.....	10

TABLE OF AUTHORITIES

Cases

<u>Dove v. Gold Kist</u> , 314 S.C. 235, 442 S.E.2d 598 (1994).....	9
<u>Gagnon v. Scarpelli</u> , 411 U.S. 778 (1973).....	6,7
<u>Johnson v. South Carolina Department of Probation , Parole, and Pardon Services</u> , 372 S.C. 279, 641 S.E.2d 895 (2007)	9
<u>Morrissey v. Brewer</u> , 408 U.S. 471 (1972).....	6, 7
<u>State v. Allen</u> , 370 S.C. 88, 634 S.E.2d 653 (2006).....	6
<u>State v. Crouch</u> , 355 S.C. 355, 585 S.E.2d 288 (2003)	9
<u>State v. Gentry</u> , 363 S.C. 93, 610 S.E.2d 494 (2005).....	9
<u>State v. Hutto</u> , 252 S.C. 36, 165 S.E.2d 72 (1968).....	9
<u>State v. Riddle</u> , 277 S.C. 110, 282 S.E.2d 863 (1981)	7

Statutes

S.C. Code Ann. § 24-21-450 (Supp.2002).....	9
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STATEMENT OF ISSUES ON APPEAL

1.

Whether the Court erred by revoking appellant's probation in full for appellant allegedly being convicted of two offenses and having been arrested for another offense since there was no evidence presented at the revocation hearing to support those allegations, and the revocation was therefore improper?

2.

Whether the court erred by revoking appellant's probation where his five years of probation had expired by the time the arrest warrant was issued on August 8, 2014, since appellant was sentenced on December 9, 2008, since the court lacked jurisdiction over appellant at the time the warrant was issued?

STATEMENT OF THE CASE

Appellant was sentenced by the Honorable R. Markley Dennis, Jr. in Cherokee County on December 9, 2008 to twelve years imprisonment, suspended on five years probation, for attempted burglary in the second degree. R. 33.

At the *bond* revocation hearing before the Honorable R. Keith Kelly on September 15, 2014, Clay Allen, who represented appellant, asked the judge to continue the case until he had time to prepare. Judge Kelly made it clear he was not concerned about probation revocation at that time, but only the bond revocation motion. Defense counsel cited “minimal due process” in support of his motion. Kim Leskanic asked to take up the probation revocation matter at the time instead, but Defense counsel said he had not been provided any discovery at that time. Judge Kelly then granted a short continuance. R. 10, l. 21 – 11, l. 16.

On September 17, 2014, a probation revocation hearing was heard before Judge Kelly. Clay Allen again represented appellant. Kim Leskanic was again the assistant solicitor. R. 13.

The entire truncated revocation hearing concerned whether appellant had been in possession of a firearm. Two witnesses, Ellis and Elmore, claimed that they had seen appellant in possession of a handgun or a shotgun while he was on probation. R. 14, l. 19 – 22, l. 25. Appellant told the judge that the firearms allegations were false, and they constituted a personal vendetta by Ellis and Elmore. R. 23, l. 1 – 25, l. 12.

The judge revoked appellant's probation ruling appellant had been convicted of two offenses on probation, and arrested on another one.¹ Thus, appellant was ordered to serve his entire twelve-year prison sentence.

This appeal follows.

¹ The judge also stated appellant was in possession of a firearm on two different occasions while on probation. R. 25, ll. 15-19.

ARGUMENT

1.

The Court erred by revoking appellant's probation in full for appellant being convicted of two offenses and having been arrested for another offense since there was no evidence presented at the revocation hearing to support those allegations, and the revocation was therefore improper.

Relevant facts

There was absolutely no evidence offered at the probation revocation hearing that appellant had been convicted of two offenses while on probation, and that he had been arrested for another offense. While there was an allegation in the probation arrest warrant that appellant had been convicted of driving under suspension in magistrate's court, and assault and battery in the third degree in magistrate's court, there was absolutely no evidence offered to support these mere allegations. R. 31.

Moreover, the judge merely mentioning the alleged possession of a gun offense in revoking probation also did not satisfy minimal due process given that the allegations were hotly disputed by the defense for the reasons below. The judge made no credibility findings as to whether Ellis and Elmore were credible where the defense asserted they had fabricated their stories to get appellant "in trouble." Minimal due process entitled appellant to an oral or written finding that the judge found them credible, and therefore considered their testimony against the strong defense attack. See Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973).

The revocation of probation or parole is not a stage of criminal prosecution, however, "a probationer or parolee has a constitutionally protected liberty interest and

cannot be denied due process simply because probation has been described as an act of grace.” State v. Allen, 370 S.C. 88, 96, 634 S.E.2d 653, 657 (2006), *citing*, Morrissey v. Brewer, 408 U.S. 471, 480-90 (1972).

The minimum due process requirements for a parole or probation hearing require: (1) written notice of the claimed violations; (2) disclosure of the evidence against the probationer; (3) the opportunity to be heard and to present witnesses and documentary evidence; (4) the right to confront and cross examine witnesses; (5) the right to a neutral and detached board or judicial officer, and, (6) the right a written statement as to the evidence relied on and the reasons for revoking probation. *See*, Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973).

Here, there was no evidence offered that appellant violated his probation by being convicted of two offenses while on probation, and being arrested for a third offense. Further, the order revoking probation in furtherance of the judge’s oral finding that appellant violated his probation on these basis, which was totally unsupported by any evidence, was only a form order. The order did not explain why probation was revoked. R. 33

Since appellant’s probation in this case was revoked without minimal due process – which requires some evidence to support allegations in an arrest warrant -- the revocation of appellant’s probation should be reversed, and this case remanded for a hearing consistent with the guidelines set forth in Morrissey and Gagnon. *See* State v. Riddle, 277 S.C. 110, 282 S.E.2d 863 (1981).

The court erred by revoking appellant's probation where his five years of probation had expired by the time the arrest warrant was issued on August 8, 2014, since appellant was sentenced on December 9, 2008, since the court lacked jurisdiction over appellant at the time the warrant was issued.

Relevant facts

Appellant was sentenced by the Honorable R. Markley Dennis, Jr. in Cherokee County on December 9, 2008 to twelve years imprisonment, suspended on five years probation, for attempted burglary in the second degree. R. 2, ll. 6-12. R. 30. (sentencing sheet). A probation arrest warrant was issued on August 8, 2014 alleging, *inter alia*, appellant had been convicted of two Magistrate level offenses, and that he illegally possessed a firearm. R. 31. (probation arrest warrant).

At the September 15, 2014 bond revocation hearing, Defense counsel Allen told the judge that appellant had asked for the appointment of a lawyer in Magistrate's Court, and for a jury trial. Instead, he was told he could not have a jury trial, and even though no witnesses appeared except the police officer, the Magistrate found him guilty. Defense counsel argued the judge therefore should not credit the Magistrate Court convictions given the total disregard for appellant's basic rights. Counsel also added that such injustices in the Cherokee County Magistrate's Court in denying basic trial rights were apparently not unusual. R. 4, l. 9 – 5, l. 22; R. 8, l. 14 – 9, l. 6.

In addition, Counsel Allen informed the judge that the firearms allegations arose from highly questionable sources, Ellis and Elmore, who were both involved in family

disputes with appellant: “For whatever reason, Mr Ellis, Robert Ellis, and this Mr. Elmore do not like my client and are trying to get him in trouble and my client denies the allegations concerning a gun. That he did not have a shotgun. He did not have a gun in his back pocket.” R. 5, l. 23 – 9, l. 1.

In State v. Crouch, 355 S.C. 355, 359, 585 S.E.2d 288, 290 (2003), the Supreme Court held, “Under S.C. Code Ann. § 24-21-450 (Supp.2002), an arrest warrant for violation of terms of probation may be issued ‘[a]t any time during the period of probation or suspension of sentence.’ The statute ‘authorizes the court to issue or cause the issuing of a warrant *only during the period of probation* and, in the absence of the timely issuance of such warrant, **the court is without authority to revoke the probation after the probationary period has passed**, even though the violation occurred during such period.’ State v. Hutto, 252 S.C. 36, 45-46, 165 S.E.2d 72, 76 (1968). Because the warrant implicates the trial court’s subject matter jurisdiction, the issue can be raised at any time. Id.”² (emphasis added).

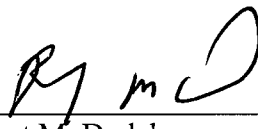
Since the probation revocation warrant was issued on August 14, 2014, more than five years after the expiration of appellant’s probation on December 9, 2013 (the five years probation being imposed on December 9, 2008), the Court lacked subject matter jurisdiction to revoke appellant’s probation. Consequently, the revocation of his probation should be vacated.

² Appellant would further note that in Johnson v. South Carolina Department of Probation, Parole, and Pardon Services, 372 S.C. 279, 286, n. 2, 641 S.E.2d 895, 898, n. 2 (2007), the Supreme Court expressly declined to state whether the cases of State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), and Dove v. Gold Kist, 314 S.C. 235, 337-38, 442 S.E.2d 598, 600 (1994) had upon the validity of prior pronouncements that an arrest warrant in a probation revocation case involves subject matter jurisdiction.

CONCLUSION

By reason of the foregoing arguments, the revocation of appellant's probation should be vacated. In the alternative, the revocation of appellant's probation should be reversed, and this case remanded to the Cherokee County Court of General Sessions for a new probation revocation hearing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', is written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

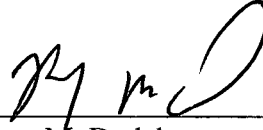
ATTORNEY FOR APPELLANT

This 14th day of September, 2015.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final 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."

September 14, 2015



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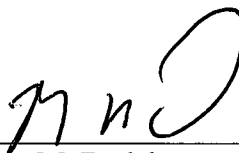
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APPELLATE CASE NO. 2014-002066

CERTIFICATE OF SERVICE

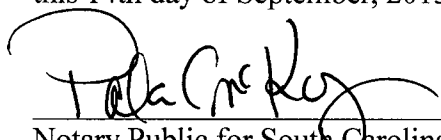
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Matthew Buchanan, Esquire, at at South Carolina Department of Probation, Parole & Pardon Services, PO Box 50666, Columbia, SC 29250, this 14th day of September,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



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

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

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.