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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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AUG 05 2015

SC Court of Appeals

Appeal from Florence County

D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

AUSTIN SYNTTELL MCKEVER,

APPELLANT

APPELLATE CASE NO. 2014-002707

ANDERS BRIEF OF APPELLANT

TIFFANY L. BUTLER
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

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STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred by denying Appellant's motion to reconsider his probation revocation where the judge revoked the full three years of Appellant's suspended sentence for failing to complete his weekend jail time, since Appellant had only twenty-five days of weekend time left to serve, Appellant received a scholarship and had started classes at Florence-Darlington Technical College during the weekends, and Appellant had not missed any weekend time prior to starting classes?

STATEMENT OF THE CASE

On May 7, 2013, Appellant waived presentment to the Horry County Grand Jury and pled guilty to use of a vehicle without the owner's consent before the Honorable Larry Hyman. R.* Kia T. Wilson represented Appellant. W. Keith Powell represented the State. R.* Sentence Sheet. Judge Hyman sentenced Appellant to three years' imprisonment suspended to ninety days weekend time and five years' probation. R.* Sentence Sheet.

On September 11, 2014, Appellant was served with a citation for violating the terms of his probation. R.* Probation Citation. On December 4, 2014, a probation violation hearing was held before the Honorable D. Craig Brown. Tr. 1. Emily Crayton represented Appellant. Agent Deidre Mack represented the State. Tr. 1.

Judge Brown revoked Appellant's probation for the full term of three years. On December 8, 2014, Appellant filed a motion to reconsider the probation revocation. Judge Brown issued an order on December 15, 2014, denying Appellant's motion to reconsider. Appellant appealed the judge's order. This brief follows.

ARGUMENT

The trial judge erred by denying Appellant's motion to reconsider his probation revocation where the judge revoked the full three years of Appellant's suspended sentence for failing to complete his weekend jail time, since Appellant had only twenty-five days of weekend time left to serve, Appellant received a scholarship and started classes at Florence-Darlington Technical College during the weekends, and Appellant had not missed any weekend time prior to starting classes.

Probation Violation Hearing

During the probation violation hearing, Agent Deidre Mack explained to the judge that Appellant had previously been brought before the court on a probation violation on May 5, 2014. Tr. 4, lines 12 – 15. Appellant had completed his original ninety-day sentence, but was failing to satisfy his monetary obligations. During the May 5th revocation hearing, Judge Brown revoked ninety days of Appellant's probation. Tr. 4, lines 12 – 15. The ninety days were to be served on the weekends beginning May 12, 2014. Tr. 4, lines 12 – 15. According to Agent Mack, Appellant began serving his weekend time but had not reported to the jail since July 2014. Tr. 4, lines 18 – 21.

Defense counsel, Emily Crayton, explained to the judge that Appellant had met with her and Agent Mack in August 2014. Tr. 7, lines 7 – 12. During the August meeting, Appellant explained to counsel and his agent that he enrolled in school at Florence-Darlington Technical College. Tr. 7, lines 12 – 14. Although Appellant was given the option to serve his weekend time on Mondays and Tuesdays, Appellant's classes interfered with those days. Tr. 7, line 12 – Tr. 8, line 9. In addition to taking classes, Appellant worked at Olive Garden in Columbia, South Carolina. Tr. 7, lines 13 – 20. Up until

Appellant began classes, contended counsel, he had not missed his weekend time. Tr. 7, 15 – 18. He enrolled in school after receiving a scholarship through Olive Garden. Tr. 7, lines 10 – 13.

Counsel also explained to the judge that Appellant's final exams will end on December 9, 2014 and Appellant will not start classes again until January 13, 2015. Tr. 7, line 21 – Tr. 8, line 4. Therefore, Appellant would be able to serve his weekend time during that period from December 9th until January 13th. Tr. 7, line 21 – Tr. 8, line 4. Appellant only had twenty-five days left to serve out of ninety days that were ordered. Tr. 9, lines 5 – 13.

Appellant spoke on his own behalf. He apologized to the court for his negligence. He explained to the judge that he had given his school schedule to his former probation agent and he that he was presented with options to better his future. Tr. 10, line 17 – Tr. 11, line 7.

The judge told Appellant:

“[W]hat the perception of the Court is is you want to do it at your convenience, that probation just is inconvenient for you. It's inconvenient. And whether that's the truth or not, that's the appearance.”

Tr. 14, lines 10 – 14. The judge revoked the full three year term. Tr. 15, lines 19 – 22.

Order Denying Motion to Reconsider

On December 8, 2014, defense counsel for Appellant filed a motion to reconsider the court's decision in Appellant's probation case. R.* Motion. Counsel stated that Appellant requested that the motion be filed and that the court schedule a hearing on the motion to reconsider.

Judge Brown issued an order denying Appellant's motion to reconsider on December 15, 2015. In his order, Judge Brown wrote:

"After reviewing the motion and the case, the court's decision remains unchanged."

R.* Order.

Discussion

The trial judge erred by denying Appellant's motion to reconsider his probation revocation where the judge revoked the full three years of Appellant's suspended sentence for failing to complete his weekend jail time. Appellant had only twenty-five days of weekend time left to serve. Appellant received a scholarship and started classes at Florence-Darlington Technical College during the weekends. However, Appellant had not missed any weekend time prior to starting classes.

The authority to change a sentence lies exclusively with the sentencing judge and is within his or her discretion. State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008) (citing State v. Smith, 276 S.C. 494, 280 S.E.2d 200 (1981). An appellate court will review a trial judge's ruling for "a prejudicial abuse of discretion." Hicks, 377 S.C. at 324, 659 S.E.2d at 500. "An abuse of discretion occurs where the conclusions of the trial court are either controlled by an error of law or lack evidentiary support." State v. Warren, 392 S.C. 235, 708 S.E.2d 234 (Ct. App. 2011).

Here, the trial judge abused his discretion by denying Appellant's motion to reconsider his probation revocation. Appellant had already completed most of his ninety days of weekend time and only had twenty-five days left to serve. Although Appellant had failed to serve his jail time during some weekends, he did so because he was attending school. Prior to beginning classes at Florence-Darlington Technical College, Appellant did

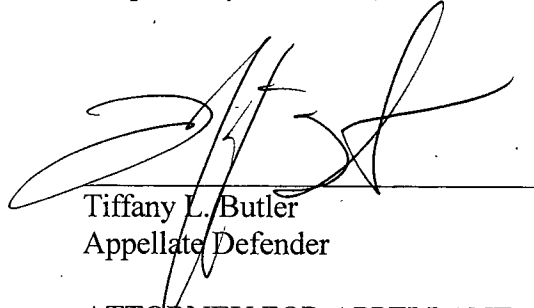
not miss serving any weekend time. Appellant was not trying to escape his probation obligations.

There is nothing in the record which supports revoking three years of Appellant's probation. Because the trial judge had no facts to support a full revocation of Appellant's probation, he abused his discretion by denying Appellant's motion to reconsider.

CONCLUSION

For the reasons argued above, Appellant Austen McKeever respectfully requests this Court to grant his motion to reconsider his probation revocation and remand to the lower court for a new revocation hearing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Butler', is written over a horizontal line.

Tiffany L. Butler
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of August, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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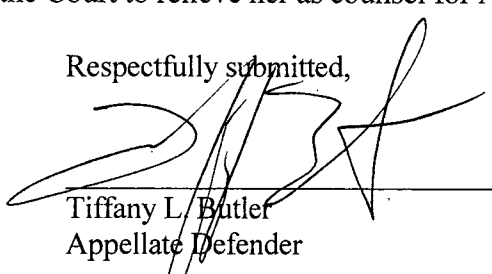
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Austen S. McKeever states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge D. Craig Brown, which was held on December 5, 2014, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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, she asks the Court to relieve her as counsel for Austen S. McKeever.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of August, 2015.

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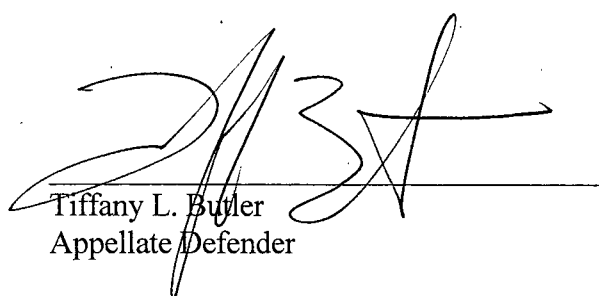
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment;
- (2) Sentence Sheet dated May 7, 2013
- (3) Transcript dated Dec. 5, 2014
- (4) Probation Citation and Affidavit
- (5) Court's Exhibit #1
- (6) Motion to Reconsider
- (7) Order Denying Motion to Reconsider

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

August 5th, 2015



Tiffany L. Butler
Appellate Defender

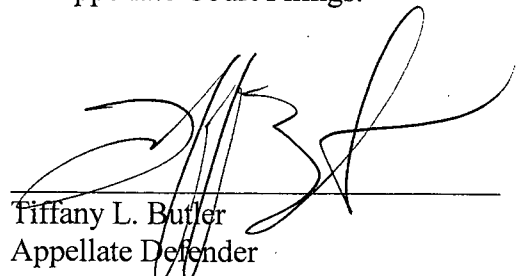
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PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

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."

August 5th, 2015



Tiffany L. Butler
Appellate Defender

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Division of Appellate Defense
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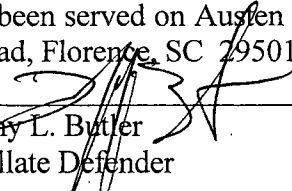
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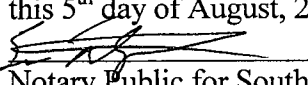
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Matthew Buchanan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Austen S. McKeever, #335195 at Palmer Pre-Release Center, 2012 Pisgah Road, Florence, SC 29501, this 5th day of August, 2015.


Tiffany L. Butler
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 5th day of August, 2015.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022