

2015

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

R. Knox McMahon, Circuit Court Judge

RECEIVED

MAY 18 2015

SC Court of Appeals

JASHAWN LIVINGSTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELATE CASE NO. 2015-000245

ANDERS BRIEF OF APPELLANT

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

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**STATEMENT OF ISSUE ON APPEAL**

Whether the court erred in revoking appellant's probation when appellant's violations were not willful?

STATEMENT OF THE CASE

Appellant was sentenced to 10 years for 2 counts of second degree burglary and 1 count of strong armed robbery suspended upon service of 30 months with 3 years probation thereafter. This sentence was imposed on June 12, 2014, in Richland County. On February 6, 2015 appellant was brought before the Honorable R. Knox McMahon in Richland County for a probation revocation hearing. Appellant was represented by Anna Rawl Good, Esq. Appellant's suspended sentences were revoked and he was ordered to serve his original 10 year sentences.

This appeal follows.

## ARGUMENT

The court erred in revoking appellant's probation because the violations were 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 Morrisey 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 probation failed to make a bona fide effort to pay." Id.

In this case the probation agent listed some of the appellant's alleged violations as failing to pay supervision fees, failing to pay restitution, failing to pay court fines, and failing to pay drug test fees. (Tr. 4, l. 25-5 l. 2) Defense counsel's position was that there violations were not willful. (Tr. 6, l. 8-9) As noted above a defendant's probation can not be revoked because he is too poor to pay a fine.

CONCLUSION

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

Respectfully submitted,



Robert M. Pachak  
Appellate Defender

ATTORNEY FOR APPELLANT

This 18<sup>th</sup> day of May, 2015.

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PETITION TO BE RELIEVED AS COUNSEL

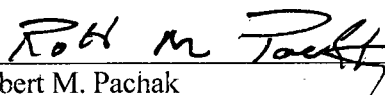
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Counsel for Jashawn Livingston states:

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. Knox McMahon, which was held on February 6, 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 Jashawn Livingston.

Respectfully submitted,

  
Robert M. Pachak  
Appellate Defender

ATTORNEY FOR APPELLANT

This 18<sup>th</sup> day of May, 2015.

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R. Knox McMahon, Circuit Court Judge

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JASHAWN LIVINGSTON,

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APPELATE CASE NO. 2015-000245

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

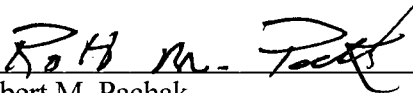
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Appellant proposes the following be included in the Record on Appeal:

- (1) Probation revocation hearing transcript;
- (2) Probation revocation arrest warrant
- (3) Order revoking probation

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

May 18<sup>th</sup>, 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."

May 18<sup>th</sup>, 2015

*Robert M. Pachak*

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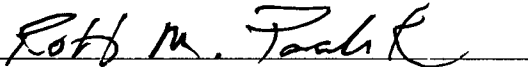
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CERTIFICATE OF SERVICE

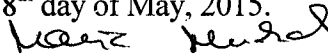
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Matthew Buchanan, Esquire, at the South Carolina Department of Probation, Parole & Pardon Services, P. O. Box 50666, Columbia, SC 29250; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Jashawn Livingston, #360356 at Lee Correctional Institution 990 Wisacky Highway Bishopville, SC 29010, this 18<sup>th</sup> day of May, 2015.



Robert M. Pachak  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 18<sup>th</sup> day of May, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.