

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Robert E. Hood, Circuit Court Judge

RECEIVED

MAR 17 2016

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

NATHAN TYRONE TELFORD,

APPELLANT

APPELLATE CASE NO. 2015-002665

ANDERS BRIEF OF APPELLANT

BENJAMIN JOHN TRIPP
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

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	2
STATEMENT OF ISSUE ON APPEAL	3
STATEMENT OF THE CASE	4
ARGUMENT	5
CONCLUSION	9
PETITION TO BE RELIEVED AS COUNSEL	10

TABLE OF AUTHORITIES

Cases

<i>Black v. Romano</i> , 471 U.S. 606, 105, S.Ct. 2254 (1985)	6
<i>Gagnon v. Scarpelli</i> , 411 U.S. 778 (1973)	6
<i>State v. Allen</i> , 370 S.C. 88, 634 S.E.2d 653 (2006)	6, 7, 8
<i>State v. Coker</i> , 397 S.C. 244, 723 S.E.2d 619 (Ct. App. 2012)	7
<i>State v. Hornsby</i> , 326 S.C. 121, 484 S.E.2d 869 (1997)	6
<i>State v. Singleton</i> , 395 S.C. 6, 15, 716 S.E.2d 332, 336 (Ct. App. 2011)	6
<i>State v. Spare</i> , 374 S.C. 264, 647 S.E.2d 706 (Ct. App. 2007)	7, 8

Constitutional Provisions

U.S. Const. amend. I	7
U.S. Const. amend. XIV	6

STATEMENT OF ISSUE ON APPEAL

Did the lower court err in revoking Appellant's probation after hearing the allegations of the State's probation agent without making specific findings as to Appellant's culpability?

STATEMENT OF THE CASE

On July 24, 2015, Appellant Nathan Tyrone Telford pled guilty in Richland County to distribution of crack cocaine—first offense before The Honorable Deandra G. Benjamin. Tivis C. Sutherland, IV represented Appellant and Meghan L. Walker represented the State. R. 1; R. 3, lines 16-20. Judge Benjamin sentenced Appellant to six years' incarceration suspended to probation with random drug and alcohol testing and substance abuse counseling to end after the earlier of completion of counseling or two years. R. 10, lines 1-10.

On September 18, 2015, Appellant's probation agent, Camilla E. Cheeseboro, served on him a probation arrest warrant. R. 12—R. 15. On October 30, 2015, Appellant appeared at a probation hearing before The Honorable Robert E. Hood. John Tate represented Appellant and the probation agent represented the State. R. 16. At the conclusion of the hearing, Judge Hood revoked Appellant's probation. R. 25, lines 1-3; R. 27.

ARGUMENT

**THE LOWER COURT'S REVOCATION OF APPELLANT'S PROBATION
CONSTITUTED REVERSIBLE ERROR BECAUSE THE COURT FAILED TO
MAKE THE FINDINGS PRESCRIBED BY LAW BASED ON THE EVIDENCE
IN THE RECORD.**

STATEMENT OF FACTS

The probation arrest warrant alleged that Appellant failed to report, failed to notify of contact with law enforcement, failed to pay various fees, and failed to complete substance abuse counseling. R. 12—R. 15.

At the probation hearing, Appellant disputed the allegations and testified that he did report on April 15, 2015 and said, “my agent was no longer there.” Accordingly, he called Ms. Cheeseboro and spoke with her on the phone, and she told him to continue reporting. “I go every month,” he then testified. R. 19, lines 17-20. Appellant also testified that he did not complete substance abuse counseling because no one cooperated with him in setting it up: “I never got none. They said they were going to contact me. I gave Ms. Stocker my number and nobody ever contacted me.” R. 19, lines 22-24. He also informed the court that he was never instructed to pay any particular fees, and even if he were, he could not have afforded it because he was out of work. R. 23, lines 9-13.

Counsel for Appellant then testified that Appellant had previously told him that he reported on April 15 and July 15, 2015, stayed until the office closed, and never reached an agent. His agent had been a Ms. Stocker, who, “as we know, has moved on to other things in the agency, no longer supervises probationers” He also testified that Appellant took a drug test and passed. R. 21, lines 5-13.

At the conclusion of the hearing, Judge Hood made a summary ruling: “All right. Revoke two years, terminate and convert. I find that you willfully violated the terms and conditions of his [sic] probation.” R. 25, lines 1-3.

DISCUSSION

The lower court’s revocation of probation constituted reversible error because the court failed to make the findings prescribed by law based on the evidence in the record. “‘A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice.’” *State v. Singleton*, 395 S.C. 6, 15, 716 S.E.2d 332, 336 (Ct. App. 2011) (quoting *State v. Hornsby*, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997)). “The Due Process Clause of the Fourteenth Amendment imposes procedural and substantive limits on the revocation of the conditional liberty created by probation.” *Black v. Romano*, 471 U.S. 606, 610, 105, S.Ct. 2254, 2257 (1985). The procedural limits include affording a probationer a number of rights:

The probationer is entitled to written notice of the claimed violations of his probation; disclosure of the evidence against him; an opportunity to be heard in person and to present witnesses and documentary evidence; a neutral hearing body; and a written statement by the factfinder as to the evidence relied on and the reasons for revoking probation. . . . The probationer is also entitled to cross-examine adverse witnesses, unless the hearing body specifically finds good cause for not allowing confrontation.

Id. at 611-12 (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973)). *Accord State v. Allen*, 370 S.C. 88, 97, 634 S.E.2d 653, 657 (2006). “While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice.” *State v. Allen*, 370 S.C. at 94, 634 S.E.2d at 655-56 (citations omitted).

While the trial court has the duty to determine, based on its discretion, “whether to revoke probation in whole or part,” the State has the duty to “present[] sufficient evidence to establish that a probationer has violated the conditions of his probation.” *Allen*, 370 S.C. at 94, 634 S.E.2d at 655-56 (citations omitted).

In *State v. Allen*, the South Carolina Supreme Court held that a probation condition prohibiting association with a person having a criminal record “implicitly requires a finding that the probationer knew the person in question had a criminal record during the period of association, and that the association was not simply an unknowing or incidental encounter.” *Id.* at 101, 634 S.E.2d at 659. The court cited cases holding that due process protects a probationer against conditions that “unnecessarily or excessively trample[] upon First Amendment rights of free association.” *Id.* at 97-98, 634 S.E.2d at 657. Thus, such cases have held that “[t]he evidence must show . . . that the probationer knew about the person’s criminal record during the period of association before the condition may be applied to revoke probation.” *Id.* at 99, 634 S.E.2d at 658.

In *State v. Spare*, 374 S.C. 264, 647 S.E.2d 706 (Ct. App. 2007), this Court held a circuit court may only revoke probation on the basis of a failure to pay money by making the following findings based on sufficient evidence in the record: (1) The State has established that the probationer has violated the conditions of his probation. (2) The probationer’s failure to pay was wilful insofar as he either had the funds and chose not to or did not make a bona fide effort to acquire the funds. (3) If the probationer could not acquire the funds despite a bona fide effort, no alternate measures are adequate to meet the State’s interests in punishment and deterrence. *See generally State v. Coker*, 397 S.C. 244, 245-46, 723 S.E.2d 619, 620 (Ct. App. 2012).

At Appellant's hearing below, the lower court failed to make any specific findings in writing or otherwise to support the revocation of probation. The State's agent did nothing more than allege that Appellant failed to report, failed to notify of contact with law enforcement, failed to complete substance abuse counseling and failed to pay various fees. The agent submitted no witness testimony or other evidence to support the allegations. On the other hand, Appellant and counsel told the court that he did report on April 15, 2015 and waited at the designated office until closing time, but no agent was present to make contact with him. He then said he reported as instructed every month. Finally, he said that he had taken a drug test and passed. Thus, the court's revocation based on the bare allegation that he did not report without the support of any discernable inferences amounts to unfair treatment resulting from whim or caprice and a denial of due process.

Moreover, like in *Allen*, the allegations that Appellant failed to maintain contact with an agent and failed to complete drug counseling were not sufficient to establish that Appellant knowingly and willingly violated a probation condition. Indeed, the testimony of Appellant and counsel shows that these shortcomings resulted not from Appellant's voluntary actions but from the State's lack of cooperation. The record reflects a common understanding that Appellant's original agent left her position overseeing Appellant. Subsequently, no one with the State cooperated with Appellant to administer new, specific procedures for reporting and counseling.

Finally, as explained in *State v. Spare*, the lower court could not have revoked Appellant's probation without a specific finding based on sufficient evidence in the record that his failure to pay was wilful insofar as he either had the funds and chose not to or did

not make a bona fide effort to acquire the funds. At the revocation hearing, Appellant informed the court that he was never instructed to pay any particular fees, and even if he were, he could not have afforded it because he was out of work. With no other discussion in the record of his ability to pay fees, the record simply could not support revocation on this ground.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the ruling of the lower court and remand for a new probation hearing.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of March, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Robert E. Hood, Circuit Court Judge

RECEIVED

MAR 17 2016

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

NATHAN TYRONE TELFORD,

APPELLANT

APPELLATE CASE NO. 2015-002665

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Nathan Tyrone Telford 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 Robert E. Hood, which was held on July 24, 2013, 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 Nathan Tyrone Telford.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of March, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Robert E. Hood, Circuit Court Judge

RECEIVED

MAR 17 2016

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

NATHAN TYRONE TELFORD,

APPELLANT

APPELLATE CASE NO. 2015-002665

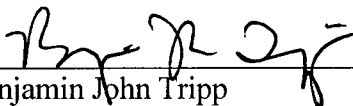
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) Transcript of July 24, 2015;
- (2) Arrest Warrant;
- (3) Probation Violation Report;
- (4) Transcript of October 30, 2015;
- (5) Probation Violation Order.

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

March 17th, 2016



Benjamin John Tripp
Appellate Defender

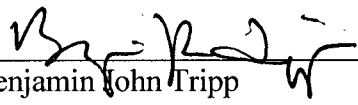
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

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."

March 17, 2016


Benjamin John Tripp
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

RECEIVED
MAR 17 2016
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Robert E. Hood, Circuit Court Judge

RECEIVED
MAR 17 2016
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

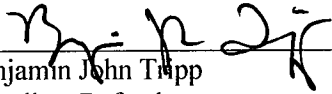
NATHAN TYRONE TELFORD,

APPELLANT

APPELLATE CASE NO. 2015-002665

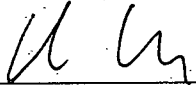
CERTIFICATE OF SERVICE

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, PO 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 Nathan Tyrone Telford, #365897 at Manning Correctional Institution, this 17th day of March, 2016.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of March, 2016.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: May 12, 2025.