STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Florence County, Twelfth Judicial Circuit
The Honorable D. Craig Brown, Circuit Court Judge
Case No. 2014-ALJ-15-0026

Appellate Case No. 2014-002664

The State,

Respondent,

v.

Gayle G. Morgan,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. **Did Morgan's Sentence for Violating Her Probation and Additional Sentence for Contempt of Court Subject Morgan to Double Jeopardy?**

STATEMENT OF THE CASE

The Appellant pleaded guilty to Financial Transaction Card Fraud and Financial Transaction Card Theft. On January 16, 2014 Judge D. Craig Brown sentenced her to five years of jail time, suspended to time served of two days and ninety days of weekend jail time and three years of probation. [R. p.6]. Soon after sentencing she failed to show up to serve the weekend jail time. The Court ordered the Appellant to appear for a show cause hearing on May 6, 2014. [Id.] At that hearing the Appellant produced a letter purporting to be from a doctor treating her for cancer. [R.p.6-7]. The letter stated that the Appellant could not serve weekend jail time because she was undergoing chemotherapy. In light of this information, the Court ordered that the Appellant's probation time be extended to the maximum period of five years. The Court also ordered the ninety-day weekend jail time to be held in abeyance while the Appellant was in treatment, and ordered that the court be updated every ninety days as to the status of her medical condition. [Id.]. Thereafter the Appellant produced another letter to the Court dated September 5, 2014, stating that she was still unable to serve weekend jail time. [R. p.7]. These letters were discovered to be forgeries created by the Appellant. [R. p.7-10].

At the hearing on May 6, 2014, the Appellant had claimed that she had suffered a heart attack earlier that year and was treated at the Medical University of South Carolina in Charleston. Her probation agent asked her to produce a letter from MUSC to verify this information. [R.p.9]. She produced to the agent a letter purporting to be a doctor at MUSC confirming her treatment. This letter also turned out to be a forgery. [R.p.10].

Thereafter agents of the South Carolina Department of Probation, Parole and Pardon Services issued a probation violation citation charging her for not serving her weekend jail time. There was to be a hearing on November 3, 2014. [R. p.10]; See Also [R.p.32-33]. While Court

was in session, the Appellant called her probation agent to inform him that she was having heart problems and had gone to the hospital. [R.p.10-11]. Given the letters that had been discovered to be fraudulent, the Court issued a bench warrant and the Appellant was taken into custody. The doctors at the hospital found nothing wrong with the Appellant except perhaps stress. [R. p.11].

On December 5, 2014 the Appellant was brought before the Court for a revocation hearing. The Appellant admitted to willfully violating the conditions of her probation, and the Court found that she had done so. [R. p.13-14]. Via her counsel, the Appellant also stipulated that she had forged the three letters that she had produced to the Court and probation officers. [R. p.14-15].

The Judge noted on the record that when he suspended a sentence or granted a person probation, he gave them a sentence equal to the time he would have given them to serve had he not suspended the sentence or granted probation. [R.p.23, p.27]. For the probation violation the Judge revoked the Appellant's probation for the full amount of time remaining of her original sentence of five years in jail. [R. p.25]. The Court stated on the record that the basis for the revocation was the Appellant's willful failure to serve her original sentence of ninety days of weekend jail time. [R. p.26]. The Judge also based the revocation on her failure to pay fines and fees as required in the original sentence and order. [R. p.27].

The Judge then found the Appellant in contempt of court for producing the fraudulent letters to the Court and to her probation agents, and for her lies and misrepresentations to the Court while under oath. [R. p.26]. For this contempt the Judge sentenced the Appellant to 120 days in jail to run consecutively with her jail term for the underlying crimes. [Id.].

ARGUMENT

I. THE APPELLANT WAS NOT SUBJECTED TO DOUBLE JEOPARDY WHEN THE JUDGE SENTENCED HER FOR CONTEMPT OF COURT.

The Appellant argues that she was subjected to double jeopardy because her probation was revoked and she was sentenced for criminal contempt on the basis of the same course of conduct: lying to the court. She relies primarily on a Florida state case, State v. Woodland, 602 So.2d 554 (Fl. 1992), and the standard for analyzing double jeopardy questions set forth in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180 (1932). Her argument fails because the record clearly shows that the trial court revoked her probation on the basis of a different course of conduct that that for which she was sentenced for contempt. Further, even if the judge did sentence her for contempt on the same basis that he revoked her probation, double jeopardy is not implicated and the Blockburger double jeopardy standard does not need to be applied.

The Appellant also suggests that the trial court abused its discretion because it reinstated the maximum possible jail time remaining on her criminal sentences and also sentenced her to additional jail time for the contempt citation. However, the facts show that the trial court did not abuse its discretion and acted within the scope of its authority.

A. The Appellant Was Not Subject To Double Jeopardy Because Her Revocation and Contempt Sentences Were Based On Different Courses of Conduct.

The Appellant asserts that her probation was revoked and she was held in contempt for the same reason: that she lied to the court at the May 6, 2015 hearing and afterwards. She also claims that her probation was revoked because she did not comply with the court's order of May 6, 2015, not because she disobeyed the Court's original sentence. The record contradicts these assertions, but they are crucial to her argument that she was subjected to double jeopardy because they make it appear as though she was punished twice for the same behavior. The U.S. Constitution,

applicable to the South Carolina Constitution via its Fourteenth Amendment, states: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." Quoting U.S. Const. amend. V. The South Carolina Constitution states: "No person shall be subject for the same offense to be twice put in jeopardy for life or liberty . . . ." Quoting S.C. Const. art. I, § 12. The clauses protect citizens from multiple criminal penalties for the same offense: "[t]he Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal or conviction, and protects against multiple punishments for the same offense." State v. Jolly, 405 S.C. 622, 626, 749 S.E.2d 114, 116 (Ct .App. 2013)(Quoting Stevenson v. State, 335 S.C. 193, 198, 516 S.E.2d 434, 436 (1999)). The Clauses protect persons from multiple prosecutions for the same offense, but only when the prosecutions occur in successive pleadings. Id. at 627.

Given the law, if the Appellant can argue that she was punished twice for the same act, she can bolster her double jeopardy claim. However, the record flatly contradicts her version of events. She was first sentenced to five years suspended to time served of two days, ninety days to be served on weekends, three years on probation, fines and fees. [R. p.6]. Thereafter the Appellant failed to report for her weekend jail time and failed to pay her fines and fees. [R. p.6, p.26-27]. This unexplained failure to comply with the terms of her sentence caused the court to summon the Appellant to the hearing on May 6, 2014. [R. p.6]. Only then began the fraudulent course of conduct that led to the contempt sentence: the Appellant lied to the court in order to excuse and conceal what had been her willful failure to comply with the terms of her sentence, and also to further avoid having to serve weekend jail time. [R. p.7-10]. When the fraud was discovered, her probation agent issued a probation citation dated October 13, 2014, charging the Appellant for the "[f]ailure to complete weekend time as ordered by Judge Brown during *initial* sentencing." [R. p.32-33] (emphasis added). At the hearing on December 5, 2014, the judge stated on the record

that he was revoking the Appellant's probation because she had willfully failed to comply with the ninety-day weekend jail term as ordered in the original January 2014 sentence. [R. p.26]. By contrast, when the Judge sentenced the Appellant for criminal contempt, he stated that he did so because of her fraudulent conduct *during and after* the May 6, 2014 hearing. [R. p.25, p.26]. Note also that the Judge did not, as the Appellant contends, revoke her probation because she violated the Court's order of May 6, 2014. In light of the record, this is plainly false.[1]

The Appellant's willful failure to comply with the court's January 2014 sentence would have been sufficient grounds for the court to revoke her probation. Even so, that by itself may not have been sufficient grounds for a criminal contempt citation. It was the Appellant's course of conduct *after* she failed to comply with the original sentence that provided the court with the grounds to find her in contempt. The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal or conviction, and protects against multiple punishments for the same offense. State v. Jolly, *supra*. Because the court's sentence of criminal contempt was based on different conduct by the Appellant that for which the court revoked her probation, she was not subjected to double jeopardy by the court.

1. *State v. Woodland Is Not Consistent With The Facts in This Case.*

The Appellant relies on a Florida state case, State v. Woodland, 602 So.2d 554 (Fl. 1992) to bolster her argument that she was subjected to double jeopardy. However the facts of that case are distinguishable from this case. In Woodland, the offender was sentenced to five years of probation after serving one year in jail. She then failed to appear at the jail to serve her time. The State

[1] Note further that the May 6, 2014 order was a product of the Appellant's fraud on the court. It would not make sense for the Court to revoke her because she refused to comply with that order, when the Court would not have issued that order but for her forged letters and her false representations to the court. Rather, absent the Appellant's fraud, the court would likely have revoked her probation at the May 6, 2014 hearing for the same reasons it did in December – her failure to obey the original sentence and order.

thereafter filed an affidavit of violation of probation. When the offender was apprehended, the State also moved to hold her in contempt of the court's order for the same conduct for which they sought to revoke her probation. The offender moved to dismiss this motion, and the trial court agreed, finding that under the circumstances seeking to revoke her parole and find her in contempt on the basis of the same conduct would subject her to double jeopardy. The Florida Court of Appeals upheld the trial court's decision. Woodland at 556.

The facts in this case are not like those in Woodland. Here the court revoked the Appellant's probation because she violated the court's original sentence and order when she failed to show up to serve weekend jail time. The court then sentenced her for criminal contempt because of the fraudulent conduct she engaged in *after* she failed to show up at the jail as ordered. [R. p.26, p.25]. Therefore, there are two individual and distinct courses of conduct underlying the revocation and sentencing. This is not like Woodland, where the court relied on only one act as the basis for a revocation and finding of contempt. Therefore, insofar as a Florida case can influence South Carolina law, the example in Woodland does not apply here.

B. There Was No Double Jeopardy Because the Appellant's Revocation Was Not a Criminal Prosecution and Did Not Impose a New Criminal Punishment.

A probation revocation proceeding is not a criminal prosecution, though the underlying violations may be criminal acts. Probation is an act of grace extended to one already convicted of a crime at a trial where the convicted has already received full due process of the law. A penalty imposed after a court finds a probation violation has occurred is a forfeiture of that act of grace. Though the court may reinstate the unserved portion of the original sentence, there is no additional punishment for the underlying crime. State v. Franks, 276 S.C. 636, 638, 281 S.E.2d 227, 228 (1981) (See also Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756 (1973)(finding that a probation revocation, like parole revocation, is not a stage of a criminal prosecution even though it may result

in a loss of liberty); (Johnson v. U.S., 529 U.S. 694, 700-701, 120 S.Ct. 1795, 1800-1801 (2000)(Finding that post-revocation penalties relate to the original offense). Further, the standard of evidence to revoke probation is different from that necessary to find a person in criminal contempt. In State v. Hill, 368 S.C. 649, 630 S.E.2d 274 (2006), the South Carolina Supreme Court distinguished revocation proceedings from criminal prosecutions and trials as it deliberated whether to extend discovery rights under Brady v. Maryland to revocation proceedings. Citing Franks, the Court observed that revocation proceedings occur after a criminal sentence has been imposed and do not necessarily involve a determination of guilt: "we have stated that while [] underlying probation violations may themselves be criminal offenses, the probation revocation proceeding is not a criminal trial of those charges, but a more informal proceeding with respect to notice and proof of the alleged violations". Id. at 657, 658 (citing State v. Franks, 276 S.C. 636, 638, 281 S.E.2d 227, 228 (1981)(internal quotations removed). The Court declined to extend the Brady rule to revocation proceedings because they are "fundamentally different from a criminal trial and other pre-sentencing proceedings", noting that probation may be revoked on evidence that merely tends to make a party look guilty, where a criminal conviction required proof beyond a reasonable doubt. Id. at 658, 659.

The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal or conviction, and protects against multiple punishments for the same offense. State v. Jolly, 405 S.C. 622, 626, 749 S.E.2d 114, 116 (Ct. App. 2013). Here the court revoked the Appellant's probation and reinstated the full remaining term of her jail sentence because she failed to comply with the court's original sentence and order. However, post-revocation proceedings are attributed to the original offense. Johnson, *supra*. Under Franks, the Appellant's revocation was neither a criminal prosecution nor the imposition of a new criminal penalty, but merely the Court's

withdrawal of its act of grace in granting probation. Further, the contempt citation was based on acts for which she had never been subject to criminal sanction and were unrelated to her earlier crimes. Therefore, when the Court sentenced the Appellant for contempt she cannot have been subject to double jeopardy because there was only one new criminal punishment – the sentence for contempt. Also, the double jeopardy clauses protect persons from multiple criminal punishments for the same offense, but only when the punishments occur in successive pleadings. Jolly at 627. If under Franks the Appellant's revocation was not a criminal prosecution, then even though the court may have revoked the Appellant's probation and sentenced her for criminal contempt, there were no multiple criminal punishments to which double jeopardy can apply.

Finally, as discussed in State v. Hill, revocation proceedings are fundamentally different from criminal prosecutions because probation may be revoked on evidence that merely tends to make a party look guilty, where a criminal conviction requires proof beyond a reasonable doubt. Here the Appellant's probation was revoked on the basis of her failure to obey the court's January sentence and order. [R. p.26 -27]. The Appellant admitted that she had willfully failed to obey, but the Court did not need this in order to revoke her probation. The fact that she refused to show up for weekend jail service and failed to pay the fines and fees tended to show that she had not complied with the order. By contrast, for the court to find the Appellant guilty of criminal contempt, proof beyond a reasonable doubt was required. See State v. Sowell, 370 S.C. 330, 336, 635 S.E.2d 81, 83-84 (2006). Therefore the revocation of the Appellant's probation and her sentencing for contempt were fundamentally different procedures applying different standards of evidence. One, the contempt sentence, imposed a new criminal punishment on evidence of guilt beyond a reasonable doubt. The other, the revocation, reinstated the Appellant's sentence where evidence that only

tended to show she had violated her probation was sufficient to do so. Consequently the double jeopardy clause does not apply.

1. *The* Blockburger *Double Jeopardy Test Does Not Apply.*

The Appellant claims that under Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180 (1932) she was subjected to double jeopardy by the trial court. The United States Supreme Court and the South Carolina Supreme Court have determined that in the context of criminal penalties, the Blockburger "same elements" test is the sole method to test double jeopardy in successive prosecutions and multiple punishment cases:

> Under the Blockburger test, a defendant may be convicted of two separate crimes arising from the same conduct without being placed in double jeopardy where his conduct consists of two distinct offenses. An application of the Blockburger test requires a technical comparison of the elements of the offense for which the defendant was first tried with the elements of the offense in the subsequent prosecution.

State v. Jolly, 405 S.C. 622, 627-628, 749 S.E.2d 114, 117 (Ct. App. 2013)

However, if, as argued above in this Brief, the revocation of the Appellant's probation was not a criminal prosecution nor a new criminal punishment, then there are no multiple prosecutions or punishments for the Blockburger standard to apply to. This may explain why the Appellant failed to actually conduct the analysis required by Blockburger. To do so the Appellant's criminal contempt citation must be compared to another crime, but she did not set forth another crime to which the elements of criminal contempt should be compared. That is because here there is no criminal prosecution independent of the contempt sentencing to which the Blockburger test may applied. Therefore the Blockburger test cannot be applied to the facts of this case.

C. The Judge Did Not Abuse His Discretion When He Sentenced the Appellant for Contempt.

The court has the inherent authority to punish offenses against it calculated to obstruct, degrade and undermine the administration of justice. McLeod v. Hite, 272 S.C. 303, 305, 251 S.E.2d 746, 747 (1979). Direct criminal contempt involves contemptuous conduct that occurs within the presence of the court. However, the presence of the court extends beyond the physical presence of the judge or setting of the courtroom to encompass all elements of the judicial system. State v. Kennerly, 337 S.C. 617, 620, 524 S.E.2d 837, 838 (1999). Here the Appellant claims that the Judge abused his discretion when he sentenced the Appellant for criminal contempt of court and sentenced her to 120 days of jail time to run consecutively with her reinstated criminal sentence for the credit card fraud and theft convictions. This is not so. A person may be found guilty of direct contempt if the conduct interferes with judicial proceedings or exhibits disrespect for the court. State v. Brant, 393 S.C. 526, 540, 713 S.E.2d 591, 598 (2011)(Citing Brandt v. Gooding, 368 S.C. 618, 630 S.E.2d 259 (2006)). Further, a person is guilty of contempt where she has the deliberate purpose to corrupt the administration of justice that is accompanied by definite overt actions designed to carry out that purpose, no matter if the attempt to corrupt justice fails. State v. Bowers, 270 S.C. 124, 132, 241 S.E.2d 409, 412 (1978). The guilt of the person accused of criminal contempt must be proved beyond a reasonable doubt. State v. Sowell, 370 S.C. 330, 336, 635 S.E.2d 81, 83-84 (2006). A determination of contempt is within the sound discretion of the court, but may be reversed where there is no evidentiary support or there has been an abuse of discretion. In order to sustain a finding of contempt, the record must be clear and specific as to the acts or conduct upon which such finding is based. Id.

Here the record was clear and specific in setting forth the nature of her fraud. [R. p.8-10]. There was proof beyond a reasonable doubt sufficient to sustain a finding of criminal contempt: the

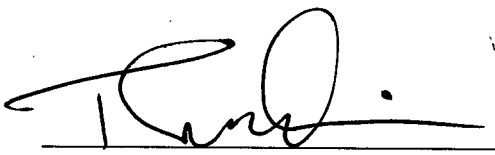
Appellant admitted she had committed a fraud upon the court. [R. p.14-15]. Pursuant to Bowers, this is sufficient to establish her guilt, as she admitted that she deliberately attempted to corrupt the administration of justice in her case, and even though her scheme ultimately failed. Given the nature of the admitted facts, the court did not abuse its discretion by finding the Appellant guilty of criminal contempt.

Further, it was not an abuse of discretion for the trial court to sentence the Appellant to jail time at the same time as it revoked her probation and reinstated the full remaining term of her jail sentence. As discussed above in this brief, when the trial court revoked her probation and reinstated her original sentence, it did not impose a new criminal punishment. The grant of probation was an act of grace by the trial court that it was not required to extend to the Appellant in the first place, and the Appellant admitted that she willfully failed to comply with the January sentence and order of probation. The Appellant's admitted fraud on the court was conduct she engaged in subsequent to the actions for which she was sentenced in January 2014. Under McLeod, the trial court had the inherent authority to punish any offense against the court made by the Appellant that was calculated to obstruct, degrade and undermine the administration of justice. Here, where the Appellant admitted to her fraud upon the court, there was no abuse of discretion for the trial court to sentence her to jail time just because it happened to coincide with the full revocation of her probation.

CONCLUSION

Based on the foregoing reasons the Respondent respectfully requests that the Court find that the Appellant was not subjected to double jeopardy, and that the trial court judge did not abuse his discretion when sentencing the Appellant for criminal contemp.

Respectfully submitted,



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November 12, 2015

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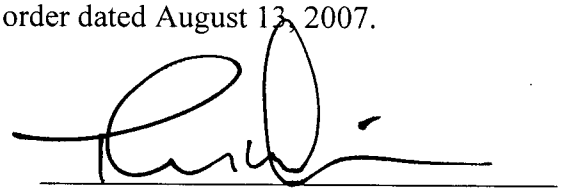
CERTIFICATE OF COUNSEL

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.



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November 12, 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 November 12, 2015, on Appellant this 17th day of August, 2015, by depositing a copy of the same in the United States mail, postage prepaid, addressed to the attorney of record:

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I further certify that all parties required by Rule to be served have been served.

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