

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Clarendon County

Howard P. King, Circuit Court Judge

RECEIVED
JUL 22 2016
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

KALVEN TERRY PEARSON

APPELLANT

APPELLATE CASE NO. 2015-002040

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

Did the court abuse its discretion by revoking Appellant's probation in full where Appellant was terminated from the Third Circuit Drug Court Program for failing to attend, where counsel informed the court appellant had a "terrible drug problem," and reasonably requested that appellant be allowed to enter a long term, inpatient drug treatment facility that a minister was arranging, particularly where the court arbitrarily refused counsel's request to prove that the long term inpatient treatment was, in fact, being arranged?

STATEMENT OF THE CASE

On May 2, 2013, Appellant was indicted by the Clarendon County Grand Jury for second-degree burglary and malicious injury to real property. R. 14 On September 11, 2013, Appellant pled guilty as charged before the Honorable R. Ferrell Cothran. R. 3, ll. 6 – 11. Scott Robinson represented Appellant. Christopher Durant represented the State. R. 16.

Judge Cothran sentenced Appellant to eight years' imprisonment suspended upon the service of two years' imprisonment and two years of probation. R. 16. Appellant was also ordered to complete the Third Circuit Drug Court as a condition of his probation. R. 16.

On June 30, 2015, Appellant was served with a citation for violating the terms of his probation. R. 19. On September 11, 2015, a probation violation hearing was held before the Honorable Howard P. King. R. 1. Scott Robinson, again, represented Appellant. Probation Agent Susan Rucker represented the State. R. 1.

Judge King revoked Appellant's probation for the full term of six years. R. 21. Appellant appealed the judge's order. This appeal follows.

STATEMENT OF FACTS

At the probation violation hearing, Judge King explained to Appellant his alleged violations. R. 3, l. 20 – R. 4, l. 4. The State alleged that Appellant had failed to report to his probation agent since January 27, 2015, failed to pay supervision fees, failed to pay fines, and failed to attend and complete the Third Circuit Drug Court Program. R. 3, l. 20 – R. 4, l. 4.

Appellant was terminated from the Drug Court program on May 27, 2015 by Judge Amy Land, the Drug Court judge. R. 4, ll. 1 – 2. Judge Land submitted a letter in which she wrote that Appellant missed a hair follicle drug test, stopped reporting for a period of time, and had a negative hair follicle drug test. R. 18. Judge Land recommended a full revocation of Appellant's probation. R. 18. At the time of the hearing, Appellant was in jail on a bench warrant for failing to attend Drug Court. R. 5, ll. 19 – 22.

Counsel for Appellant explained to the court that Appellant had "a terrible drug problem." R. 6, ll. 8 – 10. Counsel stated that Appellant had not completed any long-term inpatient drug treatment and that Appellant was asking for that opportunity. R. 6, l. 25 – R. 7, l. 3. Appellant had been working with a minister of a church in Summerton, South Carolina, who had been trying to get Appellant admitted into an inpatient drug treatment facility. R. 7, ll. 3 – 11. Because Appellant had been arrested on a bench warrant for failing to attend Drug Court, the minister was not able to enroll Appellant into a treatment program. R. 7, ll. 3 – 11.

Counsel asked the court to continue Appellant's probation but require Appellant to stay in jail on the Drug Court bench warrant until he can be admitted into a drug treatment program. R. 7, ll. 11 – 18. Counsel also asked that Appellant be transported to the treatment

facility straight from the jail once he has been accepted into a program. R. 7, ll. 11 – 18. Counsel proposed that successful completion of the inpatient drug treatment program be a condition of his probation. R. 7, ll. 11 – 18.

Counsel emphasized that Appellant “need[ed] a lot of help” and that he was willing to remain in the county jail until arrangements could be made for placement in a drug treatment facility. R. 7, l. 25 – R. 8, l. 9. The State made no objection to counsel’s request.

The court ruled that Appellant was “in violation of the terms and conditions of his probation as imposed by Judge Cothran.” R. 10, ll. 1 – 3. The court found that Appellant asserted “unsubstantiated statements about a long term program from a church in Summerton and no evidence of a program that he would be accepted.” R. 10, ll. 16 – 22. The court opined that Appellant had not “made any concrete attempts to enroll in any type of a treatment program.” R. 10, l. 22 – R. 11, l. 1.

Counsel asked the court for permission to call the minister at the church in Summerton to verify that the minister had been working to get Appellant into the drug treatment program. R. 11, ll. 17 – 22. However, the court denied counsel’s request and affirmed its ruling revoking Appellant’s probation in full. R. 11, l. 23 – R. 12, l. 3.

The judge made no finding as to Appellant’s alleged failure to pay his financial obligations. R. 10, ll. 7 – 13.

ARGUMENT

The court abused its discretion by revoking Appellant's probation in full where Appellant was terminated from the Third Circuit Drug Court Program for failing to attend, where counsel informed the court appellant had a "terrible drug problem," and reasonably requested that appellant be allowed to enter a long term, inpatient drug treatment facility that a minister was arranging, particularly where the court arbitrarily refused counsel's request to prove that the long term inpatient treatment was, in fact, being arranged.

The trial court abused its discretion by revoking Appellant's probation for the full six years and refusing to modify the conditions of Appellant's probation. Although Appellant was terminated from the Third Circuit Drug Court Program for failing to attend, he informed the court that he had a "terrible drug problem." R. 6, ll. 8 – 10.

Appellant asked the trial court to allow him to remain on probation so that he could enter into a long term, inpatient drug treatment facility and to make successful completion of the inpatient program a new condition of his probation. The court should have modified Appellant's probation to allow him to complete the inpatient program. Because the court abused its discretion, Appellant is entitled to a new revocation hearing.

The "[circuit] court may impose by order duly entered and may at any time modify the conditions of probation." S.C. Code Ann. § 24-21-430 (1976); State v. Allen, 370 S.C. 88, 96, 634 S.E.2d 653, 656 – 57 (2006). The authority of the circuit court to revoke probation "may not be capriciously or arbitrarily exercised," but should be based upon "an evidentiary showing of fact tending to establish violation of the conditions." State v. Williamson, 356 S.C. 507, 510, 589 S.E.2d 787, 788 (Ct. App. 2003) (citing State v. Hamilton, 333 S.C. 642, 511 S.E.2d 94 (Ct. App. 1999).

“Before revoking probation, a circuit court judge must determine if there is sufficient evidence to establish that the probationer has violated his probation conditions.” Williamson, 356 S.C. at 510, 589 S.E.2d at 788; see State v. White, 218 S.C. 130, 61 S.E.2d 754 (“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.”).

Here, the trial court abused its discretion by revoking Appellant’s probation in full. The court also abused its discretion by refusing to modify the conditions of Appellant’s probation by requiring him to complete the long term, inpatient drug treatment program, which Appellant requested.

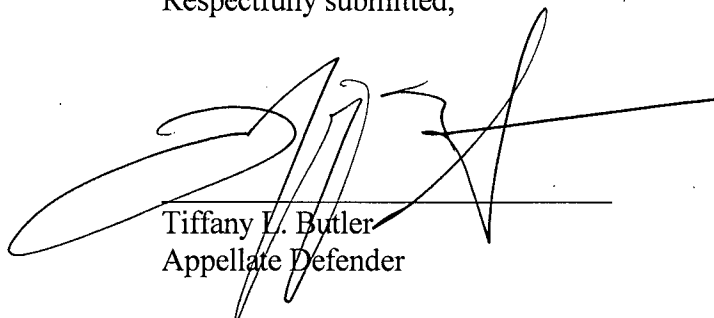
The court emphasized that Appellant had made “unsubstantiated statements” regarding his attempt to enter into the inpatient drug treatment program. R. 10, ll. 19 – 22. However, the court would not allow counsel to contact the minister who had been assisting Appellant to verify that Appellant was seeking the level of help he needed.

Because the trial court abused its discretion in revoking Appellant’s probation, Appellant is entitled to a new revocation hearing.

CONCLUSION

For the reasons argued above, Appellant Kalven Terry Pearson respectfully requests this Court to reverse the lower court's order revoking his probation in full and remand for a new probation revocation hearing.

Respectfully submitted,

A large, stylized 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 22nd day of July, 2016.

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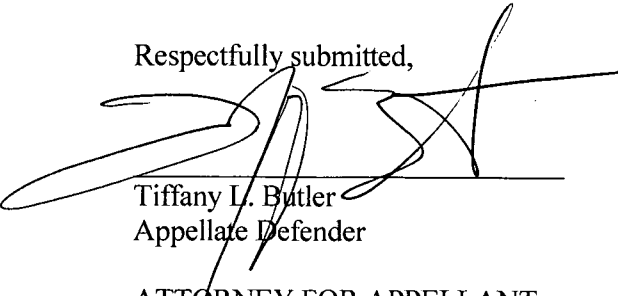
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kalven Terry Pearson 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 Howard P. King, which was held on September 11, 2015, 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 Kalven Terry Pearson.

Respectfully submitted,


Tiffany L. Butler
Appellate Defender

ATTORNEY FOR APPELLANT

This 22nd day of July, 2016.

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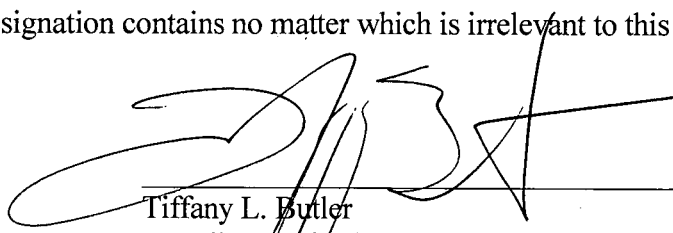
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) Hearing transcript (Sept. 11, 2015);
- (2) True-billed indictments;
- (3) Sentence Sheets;
- (4) Drug Court Letter;
- (5) Probation Citation;
- (6) Order Revoking Probation

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

July 22nd, 2016



Tiffany L. Butler
Appellate Defender

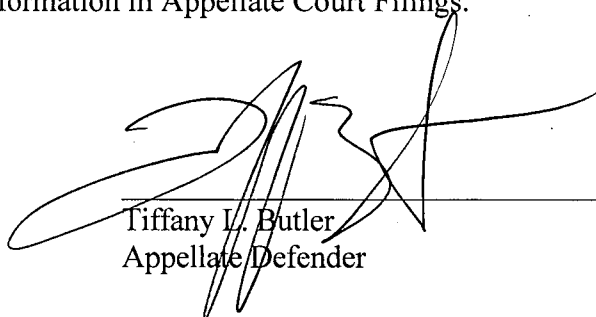
South Carolina Commission on Indigent Defense
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PO Box 11589
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(803) 734-1343

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."

July 22, 2016



Tiffany L. Butler
Appellate Defender

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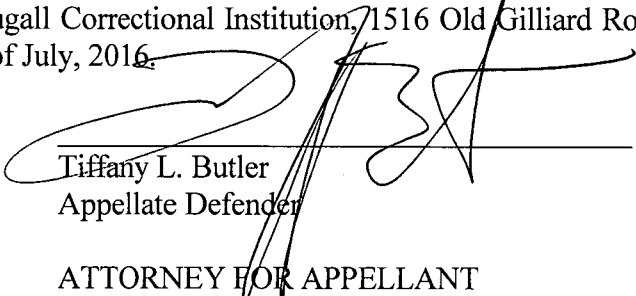
KALVEN TERRY PEARSON

APPELLANT

APPELLATE CASE NO. 2015-002040

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant, Designation of Matter, and Record on Appeal 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 Kalven Terry Pearson, at Macdougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 22nd day of July, 2016.


Tiffany L. Butler
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 22nd day of July, 2016.

Christian Ford (L.S.)
Notary Public for South Carolina
My Commission Expires: March 1, 2026.