

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RAYMOND ROBERSON,

APPELLANT

APPELLATE CASE NO. 2016-000525

FINAL BRIEF OF APPELLANT

ROBERT M. PACHAK
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STATEMENT OF ISSUE ON APPEAL

Whether due process was violated when appellant was not given proper notice and a hearing prior to his being issued with a permanent restraining order against his daughter?

STATEMENT OF THE CASE

On March 1, 2016 appellate appeared before the Honorable Brian M. Gibbons in Greenville County and pled guilty to unlawful conduct towards a child and domestic violence of a high and aggravated nature. The plea was pursuant to North Carolina v. Alford. Appellant was sentenced to five (5) years on each charge. He was also ordered to have no victim contact as a restraining order was imposed. A permanent restraining order was filed with the clerk on March 2, 2016. A motion to reconsider the permanent restraining order was filed on March 3, 2016. That motion was denied by the judge on the same date by signing "Denied" on the second page of the motion along with his name. Plea counsel has appealed and filed a Rule 203 (d)(1)(B)(iv) certification for the appeal.

This appeal follows.

ARGUMENT

Due process was violated when appellant was not given proper notice and a hearing prior to his being issued with a permanent restraining order against his daughter.

The factual basis for the guilty plea was presented by the assistance solicitor:

MS. TIFFIN: May it please the Court, Your Honor? In regard to Mr. Roberson on or about February 18, 2014 the defendant got into an argument with his live-in girlfriend's 20 year old son and they ended up exchanging blows, and when the victim tried to step in to assist her son she ended up getting thrown into the laundry room and injured. So because of the problem - - and there had been a previous situation where the defendant had pled guilty to a domestic violence and he had come back to the home, so the victim, you know, was in fear of the defendant. So after that occurred the defendant did agree to leave the residence and so the victim took him to a local Citgo station hoping that he would stay there and apparently he had drinking, she wanted him to sober up and not come back to the residence. The seven year old daughter of the victim and the defendant was in the home and the victim's son, who I previously mentioned, and the victim. And later on they heard a loud noise and saw that the defendant was actually busting into the bedroom window in that back of the trailer and he was yelling that he was going to kill everyone in the house. The victim's son, the 20 year old, went back there to try to stop this from happening, he was trying to call the police, the victim also went back there. The victim's son, Matthew, ended up being taken to the ground with the defendant, punches - - the defendant was punching him, he also punched the victim. They ended up in the living room where the victim did grab a knife to protect herself and she ended up trying to run out the front door to get help. The victim's son then being afraid when the defendant went out the door after the victim knowing that the victim had the knife in her hand and being afraid that the defendant was going to use the knife against his mother, ended up shooting the defendant with a shotgun that he had. After that the victim was able to get to the neighbor's house and was able to call the police for help, and officers arrived and investigated and made these charges. So those would be the facts that would be presented at trial. (R. p. 6, l. 19 – p. 8, l.6)

When it came time to sentence the appellant, the court added “No victim contact, restraining order for the victim.” (R. p. 10, l. 10) Later, the court filed a Permanent Restraining Order (PRO). The first page of the form order stated, “Respondent has been provided with reasonable notice and opportunity to be heard.”

Plea counsel filed a motion to reconsider the PRO. He advised the court that at the time of the plea he was only informed a restraining order would be sought concerning the victim of the CDVHAN charge. He was not told that appellant’s minor child would be included as a party or that there would be a PRO. The State did not move for a PRO until after the guilty plea and sentencing. Plea counsel was not given a copy of the order at the time of the plea. Appellant raised concerns about seeing his minor child. The plea court granted appellant permission to modify the PRO as it concerned the minor child by seeking modification in the Family Court.¹

Plea counsel argued in his motion to reconsider for a hearing to determine whether appellant should be permanently restrained from seeing his minor child. He said that a PRO without any hearing on the merits is an abuse of the discretion and a violation of due process. Appellant was not given a chance to address the merits of the PRO on the record: only after the guilty plea was the PRO presented to the court.

The permanent restraining order statute contemplates representation by counsel. S.C. Code §16-3-1910 (D)(4). A defendant is also required to be served with a summons and complaint “along with a notice of the date, time, and location of the hearing...” S.C. Code §16-3-1910 (G) Neither the judge nor the assistant solicitor, who used to be an assistant attorney general, made any attempt to comply with the statute.

¹ S.C. Code §16-3-1910 (B)(1) dealing with permanent restraining orders does not appear to allow a general sessions court to confer jurisdiction to the family court. It says, “a person must: (1) request the order in general sessions court, or family court, as applicable, at the same time the person is convicted...”

Appellant did not get the PRO until after his guilty plea and had no hearing or counsel in that regard. A State's failure to follow its own statutes violates due process. Hicks v. Oklahoma, 447 U.S. 343, 100 S. Ct. 2227 (1980). Without having counsel to represent him at the PRO hearing, the government denied appellant the effective assistance of counsel. Herring v. New York, 422 U.S. 853, 95 S. Ct. 2550 (1975).

Finally, in Kurschner v. City of Camden Planning Commission, 376 S.C. 165, 656 S.E.2d 346, 350 (2008) the court wrote:

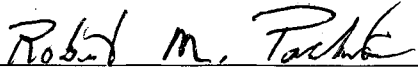
Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution. Matthews v. Eldridge, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed.2d 18 (1976). The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review. S.C. Const. art. 1, §22; Stono River Envtl. Protection Ass'n C. S.C. Dep't of Health and Envtl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991).

Likewise, in Goldberg v. Kelly, 397, U.S. 254, 90 S. Ct. 1011 (1970) the court wrote:

'The fundamental requisite of due process of law is the opportunity to be heard' Grannis v. Ordean, 234 U.S. 385, 394, 34 S. Ct. 779, 783, 58 L.Ed. 1363 (1914). The hearing must be 'at a meaningful time and in a meaningful manner.' Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L.Ed.2d 62 (1965) 379 U.S. at 267, 90 S. Ct. at 1020.

CONCLUSION

Appellant should have a hearing on the record with counsel to determine if a PRO is appropriate as to his minor child.


Robert M. Pachak
Appellate Defender

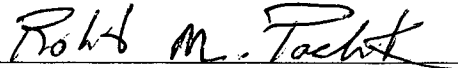
ATTORNEY FOR APPELLANT

This 4th day of April, 2017.

CERTIFICATE OF COUNSEL PRIVATE

The undersigned certifies that to the best of my ability this Final 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."

April 4, 2017



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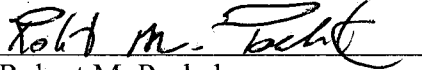
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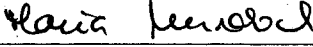
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 4th day of April, 2017.


Robert M. Pachak
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of April, 2017.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023