

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Anderson County

Honorable J. Cordell Maddox, Circuit Court Judge

THE STATE

RESPONDENT,

V.

DONALD ROBERT SURDAK

APPELLANT.

APPELLATE CASE NO 2017-000409

ANDERS BRIEF OF APPELLANT

RECEIVED

JUN 12 2017

SC Court of Appeals

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether appellant's case should be remanded to determine how much time he has had to wait for bed space at Haven of Rest Rehabilitation Center?

STATEMENT OF THE CASE

On January 12, 2016, appellant appeared before the Honorable R. Lawton McIntosh in Anderson County and pled guilty to receiving stolen goods. He was sentenced to three (3) years suspended on service of fifteen (15) months with five (5) years probation thereafter. On February 6, 2017, appellant appeared for a probation revocation hearing before the Honorable J. Cordell Maddox. Victoria Gurney, Esq. represented appellant. Al Means, Esq. was the assistant solicitor. Judge Maddox revoked ninety (90) days of probation and gave appellant credit for forty-five (45) days served. Appellant was ordered to be held in jail until he could be evaluated by Haven of Rest.

This appeal follows.

ARGUMENT

Appellant's case should be remanded to determine how much time he has had to wait for bed space at the Haven of Rest Rehabilitation Center.

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.Ct. at 2604.

In Gagnon v. Scarpelli, 411, U.S. 778, 93 S. Ct. 1756 (1973) the Court made the same procedures set out in Morrissey 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 cannot 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 probationer failed to make a bona fide effort to pay." Id.

Unlike the traditional objections to a probation violation, the appellant's attorney gave the following reason for filing an appeal:

Pursuant to Rule 203(d)(B)(iv), I am filing this appeal at the request of the Defendant, Donald Robert Surdak. Defendant wishes to appeal his sentence. He was sentenced to ninety days incarceration and then to be held for bed space at the Haven of Rest Rehabilitation Center for long term inpatient rehabilitation. The defendant is appealing based on the amount of time that he may have to wait for bed space at the rehabilitation facility. This appeal is being filed at the Defendant's request, although I am not aware of any meritorious issues to be raised upon appeal.

CONCLUSION

In light of the above, appellant's case should be remanded to determine how much time he has had to wait for bed space at the Haven of Rehabilitation Center.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of June, 2017.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Donald Robert Surdak 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 J. Cordell Maddox, which was held on February 6, 2017, 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 Donald Robert Surdak.

Respectfully Submitted,

Robert M. Pachak

Robert M. Pachak
Appellate Defender
ATTORNEY FOR APPELLANT

This 12th day of June, 2017.

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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) Guilty Plea Transcript dated February 6, 2017
- (2) Explanation for appeal
- (3) Order of partial revocation of parole
- (4) Probation Violation Arrest Warrant
- (5) True-billed indictment

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

June 12, 2017

Robert M. Pachak
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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."

June 12, 2017.

Robert M. Pachak

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CERTIFICATE OF SERVICE

The undersigned 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 SCPPPS, P.O. Box 50666, Columbia, SC 29250; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Donald Robert Surdak, at 1110 B Trotter Road, Anderson, SC 29624, this 12th day of June, 2017.

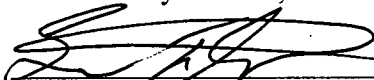
Susan B. Hackett for

Robert M. Pachak

Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 12th day of June, 2017.



(L.S)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.

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SC Court of Appeals